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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-2006

LLOYD BARRENTINE, CLYDE G. EDWARDS, CLEO KEENEY, MAXIE BLANTON, JOHNNY ROBINSON, CHARLEY DEATON, H.E. MITTCHELL, AND L.R. YOUNG,
Petitioners,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN, LOCAL 878, AND A.J. PICKERING, PRESIDENT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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June 19, 1980

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TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATUTE AND CONTRACTUAL PROVISIONS INVOLVED 2

QUESTION PRESENTED 3

STATEMENT OF THE CASE 3

A. Facts 3

B. The Proceedings Below 4

REASONS FOR GRANTING THE WRIT 7

THE DECISION BELOW IS INCONSISTENT WITH THE DECISIONS OF THIS COURT, IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS, AND HAS THE POTENTIAL FOR SERIOUSLY UNDERMINING THE GOALS OF THE FLSA. 7

CONCLUSION 16

APPENDIX 1a

TABLE OF AUTHORITIES

Page

Cases:

Abbott v. Beatty Lumber Co., 282 N.W. 2d 369 (Mich. App. 1979) 13

Alexander v. Gardner-Denver, 415 U.S. 36 (1974) 6, 8, 9, 10, 12, 14

Page

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946) 13

Beckley v. Teyssler,
332 F.2d 495 (9th Cir. 1964) 13

Brooklyn Savings Bank v. O'Neil,
324 U.S. 697 (1945) 7, 10

Leone v. Mobil Oil Co.,
523 F.2d 1153 (D.C. Clr. 1975) 12

Marshall v. N.L. Industries, Inc.,
No. 78-2289 (7th Cir. April 7, 1980) 12, 14

Martinez v. Commonwealth Oil Refinery,
17 WH 262 (Sup.Ct. of Puerto Rico 1965),
cert. denied, 383 U.S. 936 (1966) 12, 13

Overnight Motor Transport Co. v. Missel,
316 U.S. 572 (1943) 9

Satterwhite v. United Postal Service,
496 F.2d 448 (10th Cir. 1974),
cert. denied, 419 U.S. 1079 (1975) 12

Steiner v. Mitchell,
350 U.S. 247 (1956) 13

Tennessee Coal, Iron R.R. Co. v. Muscoda Local No. 123,
321 U.S. 590 (1944) 7, 9, 10, 14

Thompson v. Iowa Beef Packers, Inc.,
185 N.W.2d 738 (Ia. 1971),
cert. dismissed, 405 U.S. 228 (1972) 11, 12

Union de Tronquistos de Puerto Rico Local 901 v. Flagship Hotel Corp.,
554 F.2d 8 (1st Cir. 1977) 12

Page

United States v. Barnette,
546 F.2d 187 (5th Cir. 1977) 9

U.S. Bulk Carriers v. Arguelles,
400 U.S. 351 (1970) 11, 13

Statutes and Regulations:

Fair Labor Standards Act
29 U.S.C. § 201 *et seq.* 5
29 U.S.C. § 216(b) 7
29 U.S.C. § 216(c) 7, 14
29 U.S.C. § 255 15

Occupational Safety and Health Act
29 U.S.C. § 660(c)(1) 12

Seaman's Wage Act
46 U.S.C. § 596 11

Interstate Commerce Act
49 U.S.C. § 304 3

Federal Motor Carrier Safety Regulations
49 C.F.R. § 390 *et seq.* 3

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Lloyd Barrentine, *et al.*, respectfully petition this Court to issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on February 20, 1980.

OPINIONS BELOW

The opinion of the district court, which is not officially reported, is set forth at pages 1a-13a. The opinion of the court of appeals is reported at 615 F.2d 1194 and is set forth at pages 14a-31a.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1980. Mr. Justice Blackmun entered an order on May 9, 1980, extending the time to file this petition until June 19, 1980. Accordingly, this Court has jurisdiction to review the court of appeals' judgment pursuant to 28 U.S.C. § 1254(1).

STATUTE AND CONTRACTUAL PROVISIONS INVOLVED

Section 6(d) of the Fair Labor Standards Act, 29 U.S.C. § 206(b), provides, *inter alia,* that

> Every employer shall pay to each of his employees . . . who in any workweek is engaged in commerce or in the production of goods for commerce . . . wages . . . not less than the minimum rate in effect under subsection (a)(1) of this section.

Section 5 of Article 44 of the Southern Conference Area Over-the-Road Supplement to the Teamster National Master Freight Agreement provides, *inter alia,* that:

> It shall be the function of the . . . [grievance] committees . . . to settle disputes which cannot be settled between the Employer and the Local Union.

Section 1 of Article 45 of the Southern Conference Area Over-the-Road Supplement to the Teamster National Master Freight Agreement provides, *inter alia,* that:

> The Union and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of

> settlement as provided for in this Agreement, and in the National Agreement, if applicable, of any controversy which might arise . . . .

QUESTION PRESENTED

Does an employee's prior submission of his contractual claim for wages for hours worked to a grievance committee, as required by his collective bargaining agreement, foreclose a federal court from reviewing a subsequent claim under the minimum wage provisions of the Fair Labor Standards Act ("FLSA") where the FLSA claim was not in fact submitted to or passed upon by the grievance committee?

STATEMENT OF THE CASE

A. Facts

All interstate commercial motor carriers and drivers are subject to the Federal Motor Carrier Safety Regulations, 49 C.F.R. § 390 *et seq.*, promulgated by the U.S. Department of Transportation ("DOT") under the authority of the Interstate Commerce Act, 49 U.S.C. § 304. Those regulations require, among other things, that before embarking on an over-the-road trip, a driver must perform a safety inspection of his vehicle and refrain from driving it if mechanical defects are discovered. 49 C.F.R. §§ 392.7, 396.4 (1979).

Despite the critical importance of these inspections, Arkansas-Best Freight System ("ABF") has long maintained that it is not required to compensate the drivers based in its Little Rock, Arkansas terminal for the time they spend conducting the inspection and, when necessary, taking the vehicle to the company's repair facility. Two of the

drivers, petitioner Lloyd Barrentine and Jimmy Scates, filed several grievances, the first in 1969, alleging that ABF's failure to pay for the time they devote to pre-trip inspections violated their collective bargaining agreement.[1] Under the terms of the collective bargaining agreement, "any controversy which might arise" must be submitted to a Joint Grievance Committee. These grievances were presented by their Local Union, Local 878 of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen ("Local 878"), to the Joint Grievance Committee, composed of three union and three management representatives. As the district court found, despite the fact that the unpaid time falls within the literal terms of their contract with ABF which requires compensation for "the full time spent in the service of the Employer," the Grievance Committee rejected their claims. No written decision was issued, and there are no records of the grievance proceedings; however, ABF and Local 878 concede that only the contractual claim was submitted to, or considered by, the Grievance Committee.

B. The Proceedings Below

In March 1977, the two unsuccessful grievants, joined by four other ABF drivers, brought an action in the United States District Court for the Eastern District of Arkansas to obtain pay for the time spent conducting pre-trip safety inspections and taking unsafe vehicles to the company's repair facility. Both ABF and Local 878 were named as defendants, as was the Local's president, A.J. Pickering. In the first count of their complaint, plaintiff alleged that the time at issue was compensable under

[1]Although Mr. Scates was initially a plaintiff in this action, he recently has been elected an officer of Local 878 and has filed a motion with the district court for leave to withdraw.

the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, ("FLSA"), and hence plaintiffs were entitled to double damages, plus costs and attorney's fees. In the second count, plaintiffs asserted that Local 878 had breached its duty of fair representation by entering into a "side deal" with ABF to avoid payment, and therefore the grievance awards barring compensation should be set aside and plaintiffs be awarded proper compensation under the contract.

Following a bench trial, the district court issued an oral ruling. The court first found that "[t]here is no question that the driver when [inspecting the truck and driving it to the repair facility] is on the employer's business; at least, no question in my mind." (4a) The court was also persuaded that ABF paid its drivers for performing DOT safety checks at its other terminals and that other companies subject to the collective bargaining agreement did the same (4a). Nonetheless, the court refused to award plaintiffs judgment on their contract claim. Instead, it concluded that while "the evidence seems . . . rather to predominate in favor of the finding that there was a side agreement," such an agreement was not necessarily improper since the labor laws allow "parties by their own actions . . . [to] fill in gaps that always arise with a written instrument when you apply that instrument in a multiplicity of situations and practices." (8a) Based on these findings, the district court dismissed the action with prejudice. The court, however, did not address, much less issue a ruling on, plaintiffs' FLSA claim.

On appeal, the Eighth Circuit unanimously affirmed the district court's rulings on the contract claim, finding that the Grievance Committee decisions were not "tainted" by the side deal, if one existed (30a).[2] Turning to petitioners'

[2]No review is sought on that ruling.

FLSA claim, a divided court held "that wage disputes, arising under the FLSA . . . may be the subject of binding arbitration where the collective bargaining agreement so provides . . . at least in situations where the employees knowingly and voluntarily submit their grievances to arbitration under the terms of the agreement." (23a) In so ruling, Judge Henley, writing for himself and District Judge Schatz, rejected plaintiffs' contention that the rationale of this Court's decision in *Alexander v. Gardner-Denver,* 415 U.S. 36 (1974), applies with equal force to claims arising under the FLSA (24a). The majority purported to distinguish *Alexander v. Gardner-Denver* on the ground that "simple wage dispute[s]" do not involve the same public policy considerations that are present in Title VII cases (25a).[3]

Judge Heaney dissented from the court's FLSA ruling, finding the majority opinion in conflict with *Alexander v. Gardner-Denver, supra.* Judge Heaney stated that since "there was no intent to submit the FLSA claim to arbitration and it was not submitted to arbitration", he would have remanded the case for resolution of the FLSA claims (30-31a).

---

[3]While troubled by the fact that four of the plaintiffs did not file grievances, the court held that they too were precluded from pursuing an FLSA remedy since no objection had been lodged to the district court's "treating the case as though each of the named plaintiffs had actually filed grievances which were considered and denied." (26a)

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS INCONSISTENT WITH THE DECISIONS OF THIS COURT, IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS, AND HAS THE POTENTIAL FOR SERIOUSLY UNDERMINING THE GOALS OF THE FLSA.

The FLSA sets out a strict policy of guaranteed compensation for workers covered by the Act, and confers a right to at least the minimum wage for all hours worked – a right which cannot be abridged by contract or otherwise prospectively waived. *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 706-708 (1945); *Tennessee Coal, Iron R.R. Co. v. Muscoda Local No. 123,* 321 U.S. 590, 597, 601-603 (1944). To enforce FLSA rights, Congress has armed workers with a broad right to file suit, and vested both federal and state courts with plenary authority to enforce the statutory requirements. 29 U.S.C. § 216(b). And to encourage employees to vindicate their rights, Congress has mandated the award of double damages and reasonable attorneys' fees in all cases where the plaintiff prevails. *Id.* To further ensure effective enforcement, Congress has authorized the Secretary of Labor to bring both injunctive and back pay actions on behalf of workers. 29 U.S.C. § 216(c).

The decision below, if allowed to stand, constitutes a serious barrier to the attainment of the goals of the Fair Labor Standards Act. According to the Eighth Circuit, workers who submit contract-based wage claims to arbitration or a grievance committee, either voluntarily or because of compulsory grievance procedures in their contracts, are barred from going to court to vindicate their independent, statutory right to at least minimum wage compensation for all hours worked. Court review is foreclosed

for even those workers, like petitioners, who never intended to submit their FLSA wage claims to a grievance committee, nor had the committee pass on the merits of their FLSA claims. Because this result is antithetical to the purpose of the FLSA, inconsistent with this Court's decision in *Alexander v. Gardner-Denver,* 415 U.S. 36 (1974), and in conflict with decisions of this and other courts, the Court should grant this petition.

1. In ruling that submission of a wage claim to a grievance committee bars access to the courts to vindicate rights secured by the FLSA, the court below strayed far from the teachings of this Court in *Alexander v. Gardner-Denver,* 415 U.S. 36 (1974). There, the Court held that in Title VII cases, federal courts were not foreclosed from examining *de novo* claims of racial discrimination, even where the underlying claim had been the subject of binding arbitration under the anti-discrimination provisions of a collective bargaining agreement.

The rationale underlying the non-deferral principle in *Gardner-Denver* applies with equal force in the FLSA context. Title VII and the FLSA are congruent in all critical respects. Both are remedial statutes which accord employees distinct and independent rights; both are legislative schemes to protect workers as individuals; both vest ultimate enforcement responsibility in the courts; both depend primarily upon private enforcement actions (though both also authorize the United States to bring suits on behalf of affected workers); and both confer rights which cannot be prospectively waived. Despite the unmistakable parallels between the statutes, the court below rejected application of *Gardner-Denver,* asserting, without explanation, that since the FLSA involves "simple wage claims," which have traditionally been the subject of arbitration, deferral was appropriate (25a).

There are several reasons why the distinction between Title VII and the FLSA forged by the court below is erroneous. First, it is not the role of the courts to measure the importance of different remedial statutes enacted by Congress and effectively undermine the enforcement schemes of those considered of lesser importance. Second, the court's ruling that FLSA claims are somehow worthy of less demanding protection than Title VII claims is devoid of support. Congress has never declared that eradicating discrimination through Title VII is a more pressing social goal than ensuring through the FLSA that workers are not forced to work excessive hours, work without compensation, or be denied overtime payments. Indeed, this Court has long recognized the vital policy underpinnings of the FLSA. *Tennessee Coal, Iron R.R. Co. v. Muscoda Local No. 123, supra,* 321 U.S. at 602-603. Third, in both cases, the role of the courts is vital. Questions of statutory coverage, exemptions, and wage calculations, which often arise in FLSA suits, are no more suited for arbitration than are the issues of statutory construction which are presented in Title VII cases.

Most important, however, any suggestion that the arbitration process is better suited to enforce FLSA rights than it is to protect rights under Title VII is without foundation. As this Court has often seen, contract provisions may well cut-back on the rights guaranteed by the FLSA. *See, e.g., Overnight Motor Transport Co. v. Missel,* 316 U.S. 572 (1943); *Tennessee Coal, Iron R.R. Co. v. Muscoda Local No. 123, supra; see also United States v. Barnette,* 546 F.2d 187, 189 (5th Cir. 1977). Yet, as the Court noted in *Gardner-Denver,* the role of an arbitrator or Grievance Committee is "to effectuate the intent of the parties" not enforce "the requirements of enacted legislation." Nor can arbitrators or grievance committees em-

ploy the broad range of remedies available to a court, or award the double damages and attorneys' fees the FLSA requires. Thus, grievance procedures provide no more a bulwark to protect FLSA rights than they do to protect Title VII rights. Absent meaningful access to the courts, employers and unions will be free to alter or abrogate altogether rights set forth in the FLSA, while employees remain powerless to enforce those rights. This result, inevitable under the Eighth Circuit's ruling, is antagonistic to the intent underlying the FLSA and in conflict with the thrust of the Court's ruling in *Gardner-Denver*. Accordingly, review should be granted to correct the decision below.

The decision below is also at odds with the decision of this Court in *Tennessee Coal, Iron R.R. Co. v. Muscoda Local No. 123, supra*. There, in language equally apt here, the Court admonished that in enacting the FLSA

> Congress intended . . . to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.

321 U.S. at 602-603. *Accord, Brooklyn Savings Bank v. O'Neil, supra*. In the face of this well-settled principle of law, the Eighth Circuit's ruling effectively insulates from scrutiny an agreement which plainly "deprive[s] employees of their statutory right[ ]" to compensation. Because the Eighth Circuit's ruling is also in conflict with *Tennessee Coal*, this Court should grant review.

The ruling of the court below, that where, as here, the collective bargaining agreement provides for submission of all disputes between the parties to a grievance committee, FLSA wage claims "may be the subject of binding arbitration," also cannot be squared with the Court's decision in *U.S. Bulk Carriers v. Arguelles,* 400 U.S. 351 (1970). In a virtually identical setting, this Court in *Arguelles* held that resort to grievance machinery is not required before a seaman can assert a claim under the Seaman's Wage Act, 46 U.S.C. § 596, which regulates the pay of maritime workers. The Court's holding in *Arguelles* was predicated on two factors: (1) that the seaman was seeking to vindicate an independent statutory right which was part of a legislative scheme to protect seamen as individuals; and (2) that the remedies available through the grievance procedure were far less comprehensive than those provided for by statute. Despite the presence of both of these factors in this case and the strong similarities between the statutes, the court below failed to adhere to the Court's ruling in *Arguelles.* For this reason as well, review should be granted.

2. In ruling that "wage disputes arising under the FLSA . . . may be the subject of binding arbitration where the collective bargaining agreement so provides," the court of appeals reached the opposite conclusion from that of the Iowa Supreme Court in *Thompson v. Iowa Beef Packers, Inc.,* 185 N.W. 2d 738,742 (Ia. 1971):

> We doubt that the general Congressional intent favoring arbitration can stand against the specific Congressional intent which is manifested in the Fair Labor Standards Act provisions giving employees strong and detailed rights in court. We think Congress intended that workmen have free access to the courts in FLSA cases.

This Court granted certiorari in *Iowa Beef Packers* to decide whether exhaustion should be required, but dismissed the writ as improvidently granted when it developed at oral argument that the collective bargaining agreement applied only to "grievances pertaining to a violation of the Agreement." 405 U.S. 228, 230 (1972). Because the collective bargaining agreement here requires submission of "any controversy," the exhaustion issue is squarely presented in this petition. *But see Union de Tronquistos de Puerto Rico Local 901 v. Flagship Hotel Corp.*, 554 F.2d 8 (1st Cir. 1977); *Satterwhite v. United Postal Service,* 496 F.2d 448 (10th Cir. 1974), *cert. denied,* 419 U.S. 1079 (1975).

The Eighth Circuit's approach also cannot be reconciled with that taken by the Seventh Circuit in its recent decision in *Marshall v. N.L.Industries, Inc.*, No. 78-2289 (April 7, 1980). There a unanimous court found *Alexander v. Gardner-Denver* controlling in holding that a prior arbitration award did not bar a subsequent suit under the Occupational Safety and Health Act. 29 U.S.C. § 660(c)(1). Although the court expressly recognized the Eighth Circuit's contrary ruling here, *see* slip op. at 5 n.5, it nonetheless followed *Gardner-Denver.* In light of the divergent constructions placed on the scope of *Gardner-Denver* by the circuits, this Court should grant review.

To the extent that the decision of the court below bars suits by even those employees who did not file grievances, it is also in conflict with both circuit court and state court decisions. The weight of authority holds that even where the collective bargaining agreement provides for arbitration, employees may elect to bring their FLSA claim directly to the courts. *Leone v. Mobil Oil Co.,* 523 F.2d 1153 (D.C. Cir. 1975); *Martinez v. Commonwealth Oil Refinery,* 17 WH 262 (Sup. Ct. of Puerto Rico 1965), *cert.*

denied, 383 U.S. 936 (1966); *Abbott v. Beatty Lumber Co.,* 282 N.W.2d 369 (Mich. App. 1979); *cf. U.S. Bulk Carriers v. Arguelles, supra. But see Beckley v. Teyssler,* 332 F.2d 495 (9th Cir. 1964).

In this case, it is undisputed that four of the petitioners never filed grievances. Despite that fact, the court below ruled that they too were barred from litigating their FLSA claims because no objection was lodged to the district court's "treating the case as though each of the named plaintiffs had actually filed grievances which were considered and denied." (26a) But the district court's remark was made in the context of rejecting defendants' claim that the employees who had not pursued grievances should be dismissed as plaintiffs for failing to exhaust. The court never addressed the question of whether plaintiffs had an independent right to maintain their FLSA action. Yet by dismissing the claims of the four who did not file grievances on the basis of the decisions issued in connection with the grievances filed by Barrentine and Scates, the courts below deprived four petitioners of any redress whatsoever for their statutory claim, and in so doing created a conflict with the decisions of the D.C. Circuit and several state courts.

3. The ruling of the court of appeals will also impede the effectuation of the policies of the FLSA. Here, there can be little dispute that the FLSA requires compensation. The time spent by ABF's drivers in checking their vehicles and driving them to the repair shop is "an integral and indispensible part of the principle activity of the employer", and hence compensation is required. *Steiner v. Mitchell,* 350 U.S. 247, 252 (1956); *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680 (1946). Indeed, the district court held that there was "no question" that these were hours worked, a finding expressly endorsed by the court of ap-

peals. To allow a grievance award to stand as an absolute bar to court review can only serve to undermine the "national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act." *Tennessee Coal, supra,* 321 U.S. at 602-603.

The conclusion reached by the Eighth Circuit may also create further difficulties in enforcing the FLSA. Although the FLSA depends primarily upon individual enforcement efforts, the Secretary of Labor is also empowered to bring actions under the FLSA upon request by an employee. 29 U.S.C. § 216(c). Since the Secretary's power to bring an action derives from the rights of an aggrieved employee, the Eighth Circuit's ruling might well be read to foreclose an action by the Secretary where the employee has either filed a grievance on a related wage claim, or is subject to a collective bargaining agreement which requires submission of all disputes.

An analogous argument was raised recently before the Seventh Circuit in *Marshall v. N.L. Industries, Inc.,* No. 78-2289 (April 7, 1980). There the defendant contended that a suit by the Secretary of Labor under the Occupational Safety and Health Act on behalf of an employee was barred by prior submission of the underlying dispute to arbitration. Although the Seventh Circuit rejected the argument, it did so relying on the non-deferral principles of *Alexander v. Gardner-Denver* – an approach specifically rejected by the court below. Accordingly, under the court of appeals decision here, it remains an open question as to whether the Secretary of Labor could institute an enforcement action against ABF – particularly if it was relying upon the request of one of the petitioners. Because the decision below thus may well constitute a serious limit upon the Secretary's authority to enforce the

FLSA, as well as on the right of individual employees to maintain FLSA suits, this Court should grant review.

Unless promptly remedied by this Court, the uncertainty engendered by the conflicting decisions in this area will inevitably take a harsh toll on employees who believe that their FLSA rights are being violated. Employees who determine initially to file suits, as the FLSA literally allows, are placed in the unenviable situation of having to risk dismissal for failing to exhaust grievance procedures, thereby wasting time and money. On the other hand, employees who pursue their claims through the grievance process may well be held to have irrevocably waived their right to have a court review their FLSA claim. In that event, even should they prevail in the grievance process, they would not have an opportunity to be awarded double damages and attorneys' fees as the FLSA mandates. At the very least, in either case, the employees risk running afoul of the statute of limitations of the FLSA or the contractual grievance provisions. *See* 29 U.S.C. § 255. Accordingly, a definitive ruling by this Court is warranted both to clarify this issue of law and eliminate the obvious potential for extensive litigation now posed by the dilemma in which the decision below places employees.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 19, 1980

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION
_____oOo_____

LLOYD BARRENTINE, et al, PLAINTIFFS

vs. LR-C-77-85

ARKANSAS BEST FREIGHT SYSTEMS, INC., et al DEFENDANTS.

REPORTER'S PARTIAL TRANSCRIPT

OPINION OF THE COURT

Little Rock, Arkansas
Friday, May 4, 1979

BEFORE HONORABLE RICHARD S. ARNOLD
United States District Judge

APPEARANCES

For the Plaintiffs:	MR. JOSH E. McHUGHES and MR. J.H. COTTRELL 316 Izard – 501-376-9131 Little Rock, Arkansas
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For Teamsters Local 878:	MELVA H. KOZINSKY Tower Building Little Rock, Arkansas

LITTLE ROCK, ARKANSAS, FRIDAY, MAY 4, 1979, 1:00 O'CLOCK P.M.

COURT CRIER: All please rise. The United States District Court for the Eastern District of Arkansas is once again in session. Please be seated and come to order.

THE COURT: Since all of the parties have rested the case is now ready for a decision, and the Court will now deliver its Opinon.

To begin with, the Court has jurisdiction of the case under Section 301 of the Labor Management Relations Act of 1947, and under Section 1331 of the Judicial Code, the General Federal Questions Division.

The claim presented arises under two federal statutes, Section 301 which I have already mentioned, the Minimum Wage Act or the Fair Labor Standards Act, 29 USC Section 216(b).

The parties remaining in the case on the plaintiffs' side are six in number and they are named in the caption of the Complaint; three of the plaintiffs have been dismissed with prejudice on motion of the defendants and with the consent of counsel for the plaintiffs at the beginning of the trial. The defendants are Arkansas Best Freight System, Inc., a trucking company, International Brotherhood of Teamsters, Local 878, a labor organization.

The question in the case has to do with whether or not the six named employees are entitled to be paid for a certain period of time that the parties have customarily referred as the pre-trip inspection time, or the DOT inspection time. This period of time occurs between what has been called punch-out and what has been called punch-in; that is, when the driver appears at a terminal to begin a trip, having been called in, his first duty is to pick up what they have referred to as the bills, that is, a manifest showing where the trip is going and other necessary facts. At that point the driver punches a clock. That is referred to as

punching out; he then goes to see if his vehicle, that is, the tractor and trailer that he is going to drive is in good enough shape to make the trip.

At this point under Section 392.7 of the Department of Transportation Regulations the driver is obligated to check the unit and the regulations list certain specific items that are to be checked. If the unit checks out, the driver gets in it and drives away and proceeds on his trip, for which under this contract he is paid at a mileage rate, providing, however, that he shall not be paid less than eight hours time.

If the unit does not check out, he takes it to be repaired at a repair shop belonging to the company and on the premises of the company, and when he arrives at the repair shop he punches in, that is, there is a second clock. And, of course, I am referring here to the Little Rock terminal only of Arkansas Best Freight, because that's the location about which this dispute has arisen.

The truck is then repaired, and the actual time consumed in repairs, that is, between the time of punching in at the repair shop and the time that the truck is released to the driver, having been repaired, that time is paid for and there is no dispute about that.

There is also no dispute that the time consumed by a pre-trip inspection is not paid for if the vehicle checks out, because in that instance the driver simply drives away; he does not punch in or log time in any way. So, the question has to do with the period between punching out and punching in in those instances where the driver has found something wrong with the unit.

There has been a good deal of dispute in the case as to whether or not it is ABF's practice in other terminals to

pay for this time. The Court is persuaded that it probably is the practice at other terminals to pay for the time.

It is true that the exhibits that have been introduced with respect to that issue are somewhat ambiguous, but the Court believes that other terminals do pay for this time, or at any rate that is going to be assumed as part of the basis for this decision.

The Court also is going to assume that other truck lines, specifically Strickland, pays for this time. The practice at Strickland is somewhat different; it appears to be a more or less arbitrary rule there, but fifteen minutes of this time is paid for regardless of how much time is actually consumed.

But, again, for the sake of the argument, the Court assumes that Strickland pays for the time and that is the regular practice.

So, what we have, initially at least, is a question of whether or not under Article 50 of the Collective Bargaining Agreement this time is time spent in the service of the employer. If this were an ordinary contract action involving not a Collective Bargaining Agreement but some other kind of contract, the Court would be strongly inclined to rule in favor of the employees. It is difficult for me to see, based only upon the wording of the contract, why this time is not in the service of the employer. It is true that the DOT Regulations places upon a driver personally the obligation of seeing that the unit is properly operating. There is no question that the driver when doing so is on the employer's business; at least, no question in my mind.

And, in addition, it can be argued that it is the employer's duty if that unit is on the ready line to see that it is already in shape.

But this is not an ordinary contract action between private parties. This is an action on a Collective Bargaining Agreement, and the rules are quite different in construing and defining those agreements from the rules applicable in an ordinary contract case.

So, it is appropriate at this point to summarize briefly what the rules are with respect to Collective Bargaining Agreements.

To begin with, Congress has clearly specified in Section 203(b) of the Act of 1947, and I am quoting, "That final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes", 29 USC Section 173 (d).

There is such a method specified in this contract. Article 44 of the contract sets up a procedure for the handling of disputes as to contract interpretation called a "Grievance Procedure". Under this procedure an employee who believes that he has been mistreated can file a grievance with his Local Union, and it then becomes the duty of the Union to process that grievance with a Joint Committee; by "Joint" I mean the employers and the Union; called the Southern Multistate Grievance Committee. The Committee has sat at various locations, Buloxi, Dallas and Memphis have been mentioned. That Committee is composed of six members, three representing the management side and three representing the Union's side. None of the members in a case involving ABF and Local 878 would be either employees of ABF or members of Local 878.

If that Grievance Committee decides the case by a majority vote, that is, at least four members concurring, under Article 44 of the contract the decision is final and binding on the parties. If on the other hand the Grievance Committee splits three to three, then there is a further pro-

cedure specified in the contract for resolution of the deadlock. There is no contention that the deadlock provisions ever came into play in this case because there was no deadlock.

In any case, the evidence is clear that there were grievances presented from time to time with respect to this issue. Two of the named plaintiffs, Mr. Barrentine and Mr. Scates actually presented grievances and those grievances were denied, that is, the committee decided that the grievances were not well taken. The committee decided that under the contract the money was not owed.

The other four employees did not actually present grievances. The defendants have argued that their claims should be dismissed because of failure to exhaust their remedies under the contract. This Court does not agree with that attitude. The Court finds that the grievances were not presented because it would have been a futility to present them. It was well known what the committee was ruling and there was no reason for the other employees to waste their time and paper by filling out grievances when the result was clear in advance.

So, the Court is treating the case as though each of the named plaintiffs had actually filed grievances which were considered and denied.

There is no evidence that a grievance was actually rejected, that is, there is no evidence that a grievance was ever taken to the Union and the Union official refused to take it. The claim rather is that the Union officials during a certain period of time before January 19, 1974 were perfunctory, or acted in bad faith, or did not properly represent the interests of the employees in pursuing these grievances, and there is some evidence to support that in a general way. There apparently was a good deal of animosi-

ty between Mr. Odell Smith, the former president of the Union, and some of the employees, especially employees of ABF. That animosity ultimately resulted in an election in which Mr. Pickering, the present president of the Union succeeded Mr. Smith. The general feeling that has been expressed by the plaintiffs is that Mr. Smith was rather uncooperative, and is a feeling that the Court understands.

The fact remains, however, that the grievances were taken to the Multistate Committee and were decided by that Committee.

So the question becomes under the controlling Supreme Court precedents whether there is any reason in the evidence to set aside and disregard the findings and holdings of the Grievance Committee. The Supreme Court has admonished the lower Courts that the method of decision set out in the contract is to be honored; that the Congressional policy which I have referred to in quoting from the statute can be effectuated only if the means chosen by the parties for settlement of any differences under a Collective Bargaining Agreement is given full play. The Courts are not to usurp those functions since Collective Bargaining contracts are properly entrusted to the arbitration tribunal, and when the Court speaks of "arbitration" the same principles apply to a grievance procedure such as that as is set out here, because it is, in effect, the same thing.

We are told further that the lower courts should not undertake to review the merits of the arbitration awards and should defer to the tribunal chosen by the parties finally to settle their disputes; otherwise review by a Court of the merits would make meaningless the provisions that the arbitrator stated in his findings. Those are quotations from Hines against Anchor Motor Freight, 424 U.S. 554 at Pages 562 and 563, a case decided by the Supreme Court

in 1976, and apparently the latest precedent that is a comprehensive discussion of the roles of the grievance procedure in this kind of a dispute.

And so the Court has to examine and determine what happened to those grievances, and as far as possible to determine why what happened did happen.

The claim is, essentially, that the grievance procedure was vitiated or that its integrity was undermined because there was a side deal of some kind between the Union represented by Mr. Smith and the employer.

The Court is rather inclined to think that there was a side deal. The testimony is sharply conflicting on that point and the Court is not holding that it disbelieves Mr. Carter. It was not necessarily Mr. Carter who was a party to the side agreement, but the Court is assuming for the sake of argument that there was in fact a side agreement between Mr. Smith for the Local Union under his control and the company.

The Court is particularly persuaded by the testimony of Mr. Pickering on that point. Mr. Pickering didn't say that there was a side agreement and, in fact, said that he had no personal knowledge of it; but when the Court considers the implications of his testimony and the direct testimony of the other employees, the evidence seems to me rather to predominate in favor of the finding that there was a side agreement. So, the Court is going to assume that there was for purposes of further discussion.

Let me say, first of all, that there is no evidence whatever that the side agreement was illegal or improper. There is no evidence, indeed there has been no suggestion, that Mr. Odell Smith received any improper consideration from the company. There is no evidence that the side

agreement was fraudulent. There is no evidence that it was necessarily even improper under the contract.

There are a lot of situations that arise under contracts as there are under statutes where the parties fill in the gaps, so to speak, by making side agreements from time to time. The practice about paying one-quarter hour, for example, even if only eight minutes has been worked but paying nothing if seven minutes has been worked, is a side agreement of sorts. It could be argued that it was directly contrary to Article 50 to pay a man nothing when he has worked seven minutes because Article 50 doesn't say anything about quarter hour increments.

So, side agreements can be, it is possible, made from time to time where the parties by their own actions, explicit or implicit, fill in the gaps that always arise with a written instrument when you apply that instrument to a multiplicity of situations and practices.

In any event, even if there was a side agreement, and the Court is assuming that there was one, and even if it was improper, there is no evidence that the existence of a side agreement had anything to do with the way these grievances were decided by the Committee. For example, we know that grievances were presented by Mr. Barrentine and Mr. Scates after Mr. Pickering became president of the Union and no one has complained that Mr. Pickering behaved improperly, or that the Union has been unresponsive under his leadership. The testimony is all to the contrary.

Specifically, Mr. James French, who handled one of these grievances has had his conduct approved by these plaintiffs, they are not complaining that he did anything improper. So, we have a clearly untainted, you might say,

decision by the Grievance Committee in the post-Smith time period.

Plaintiffs seek to avoid the force of that by arguing that the Committee was decisively influenced by precedent, that is, the argument is that there was a tainted decision of the Grievance Committee during the Smith regime, that the Grievance Committee during the Pickering regime relied upon that tainted precedent, and that, therefore, the entire grievance process under both leaderships is suspect. The Court cannot agree with that argument.

It is true that past precedent was argued to the Committee in the post-Smith grievance hearings, and I feel certain, and I am assuming for present purposes, that the fact that Mr. Barrentine had lost his 1969 grievance was argued to the Committee after Mr. Smith went out as a reason for adhering to the same ruling.

But here we are faced with the direct testimony, which the Court believes, of Mr. William G. Carston who handled the 1969 grievance for the company. His testimony was that the grievance was not perfunctorily presented on either side and that nothing about a side agreement was stated to the Committee. The Court, therefore, concludes that the side agreement, if it existed, did not have any effect on the 1969 grievance decision and that, therefore, any effect that the '69 grievance decision had on the later grievance decision was not improper.

In addition, the testimony of Albert L. Johnson, which the Court also believes, is persuasive. He presented the company's side of the Barrentine and Scates grievances during Mr. Pickering's term, and his testimony is that there was nothing said in the Committee about the side agreement at that point.

So what we have is a decision of the Grievance Committee untainted and uninfluenced by anything about a side agreement.

Why did the Grievance Committee reach the decision that it did? That would be speculation on the Court's part because no reasons were given, but the Court can mention a few factors that may have led the Committee to come to its conclusions.

First of all, there are always disputes about methods of computing time. For example, the Strickland practice of paying for fifteen minutes no matter how much time is actually spent. For another example, the practice at ABF of paying for a quarter hour.

There are questions that arise in the interpretation of the contract that have to be settled one way or the other, and the Court cannot say that the contract is so clear on this point that the Grievance Committee decision was without rational basis.

In addition to that argument there was the point of past practice which is an influential point in this matter. There was the fact that there was another precedent involved, not only the '69 down time precedent, but there was a precedent from the Central States findings under which Case Number 412 involving Mr. Winfield, an employee of East Texas Motor Freight.

So the result is that the Grievance Committee, for reasons sufficient to itself, decided that this time was not spent in the service of the employer within the meaning of the contract.

This Court is not at liberty to substitute its judgment for the judgment of the Grievance Committee. The Commit-

tee was established by the contracting parties to make this kind of decisions, and the Court doesn't have the power to set it aside. If the Grievance Committee had been shown to have been influenced by fraud or impropriety, or if the Union had failed in its duty of fair representation to these employees, or if, perhaps, the decision was so clearly contrary to the language of the contract that some impropriety could be inferred, then the bar of finality attaching in this contract to the Grievance Committee's decision could be voided. The Court finds that none of these requirements is met here. The result that the decision of the Grievance Committee is final and binding and it is a bar to these claims; therefore the Complaint must be dismissed with prejudice.

Mr. McHughes, do you have any question about the Court's ruling, or has anything been omitted?

MR. McHUGHES: No, your Honor.

THE COURT: Miss Kozinski?

MISS KOZINSKI: No, your Honor.

THE COURT: Mr. Maurras?

MR. MAURRAS: No, your Honor.

THE COURT: Judgment will be entered accordingly.

Mr. Marshal, we are in recess.

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CERTIFICATE OF REPORTER

I, Thomas R. Lancaster, Official Court Reporter for the United States District Court for the Eastern District of Arkansas, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the Opinion of the Court had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me to the best of my ability.

/s/ Thomas R. Lancaster
THOMAS R. LANCASTER

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1480

Lloyd Barrentine; Clyde G. Edwards; Cleo Keeney; Maxie Blanton; Johnny Robinson; J.N. Scates; Charley Deaton; H.E. Mittchell and L.R. Young,	*	
Appellants,	*	
v.	*	Appeal from the United States District Court for the Eastern District of Arkansas.
Arkansas-Best Freight System, Inc.; International Brotherhood of Teamsters, Chauffeurs and Warehousemen, Local 878, A.J. Pickering, President,	*	
Appellees.	*	

Submitted: December 6, 1979
Filed: February 20, 1980

Before HEANEY and HENLEY, Circuit Judges, and SCHATZ, District Judge.*

*The Honorable Albert G. Schatz, United States District Judge, District of Nebraska, sitting by designation.

HENLEY, Circuit Judge.

This labor case is before us on appeal from a final judgment of the United States District Court for the Eastern District of Arkansas (The Honorable Richard S. Arnold, District Judge) dismissing with prejudice after a substantial bench trial a two-count complaint filed by Lloyd Barrentine, J.N. Scates, and certain other persons against their employer, or former employer, Arkansas-Best Freight System, Inc. Also joined as defendants were Local Union 878 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers and A.J. Pickering who had become president of the local union when this action was commenced in the district court in 1977.[1] For convenience, we will refer to the employer defendant as "the Company" or as "ABF"; and we will refer to the union defendant as the "Union" or as "Local 878."

ABF is a motor carrier of freight. It operates in interstate commerce under certificates of public convenience and necessity issued by the Interstate Commerce Commission as provided by what until recently was Part II of the Interstate Commerce Act, 49 U.S.C. § 301 *et seq.*[2] The

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[1]The litigation in the district court was commenced originally in 1973, and at that time Odell Smith was president of Local 878. That suit was dismissed without prejudice in 1976 and was duly refiled. Plaintiffs, who are truck drivers, originally sought to prosecute the case as a class action under Fed. R. Civ. P. 23. However, they never asked for a formal certification of the case as a class action, and in a pretrial order entered by the district judge on April 26, 1979 class action certification was refused; that action on the part of the district court is not in issue on this appeal.

[2]Part II of the Act just mentioned has now been superseded by the Revised Interstate Commerce Act that was adopted in the fall of 1978. Act of October 13, 1978, P.L. 95-473, 92 Stat. 1466 *et seq.* We do not understand that the 1978 revision of the statute is material as far as this case is concerned.

Company is a common carrier, and in its operations it makes use of tractors and semi-trailers which at a given time may or may not be in need of repair or adjustment in order to make them safe for over-the-road operations. The Company employs persons in a number of categories of employment, including over-the-road drivers.

During the suit period, ABF and its drivers were subject to the provisions of the Interstate Commerce Act above mentioned, and also to the provisions of the Labor-Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.*, which incorporated the provisions of the original National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ABF was also subject to relevant provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*, and as modified by § 4 of the Portal-To-Portal Pay Act of 1947, 29 U.S.C. § 254.

Additionally, under regulations promulgated by the Department of Transportation ABF's over-the-road drivers were required to make pre-trip safety inspections of the respective vehicles assigned to them. 29 C.F.R. §§ 392.7, 392.8 and 396.4 (1977).

ABF has its principal place of business in the City of Fort Smith in the Western District of Arkansas; it also operates a substantial terminal in Little Rock, which is in the Eastern District. Plaintiffs were employed at the Little Rock terminal. They were represented for collective bargaining purposes by Local 878, which is one of the local unions affiliated with the large international union that has been identified and which is generally called the "Teamsters Union."

Over the relevant period of time a collective bargaining agreement was in force between members of the trucking industry, on one hand, and the Teamsters Union and its

locals, including Local 878, on the other hand. ABF and other truckers operating in Arkansas, notably Strickland Transportation Co., were parties to the agreement.

Article 44 of the collective bargaining contract, hereinafter called the Agreement, set out a detailed grievance procedure with binding arbitration by a joint industry-labor grievance committee as a final step.

Under Article 50 of the Agreement, as written, the respective employers were required to pay their employees for all time worked by them in the service of the employer.

An individual employed as an over-the-road truck driver might be required to perform non-driving tasks. In such a situation he was paid at one wage rate for time actually spent in driving and at a lower rate for non-driving time.

The controversy presently to be described arose in connection with the matter of compensation for the Company's Little Rock drivers for time spent in making pre-trip safety inspections and in taking their vehicles to the Company's repair facilities if the inspections developed that the vehicles needed repair.

There were originally nine plaintiffs in the case but as to three of them the complaint was dismissed with prejudice; the case went to trial as to the remaining six, including Lloyd Barrentine and J.N. Scates, the principal complaining drivers.

Prior to the commencement of the action Barrentine and Scates submitted formal grievances; the other driver plaintiffs did not do so. The complaints of Barrentine and Scates, which were representative, went to final arbitration before the joint grievance committee referred to in

Article 44 of the Agreement and were rejected.[3] The case was treated as though Barrentine and Scates had been joined in the grievance-arbitration proceedings by the other four drivers with respect to whom the case went to trial.

An ABF driver employed at Little Rock is required when reporting for duty to "punch in" on a time clock; he then performs certain preliminary functions in the office for which he is paid but not at driving time rates. After the preliminary work is completed, he "punches out" and proceeds to his assigned vehicle or "rig."

Upon locating his rig, the driver makes the required pre-trip safety inspection which consumes only a short period of time. If he finds no defects, he proceeds on his way, and in that case he is paid driving time for all time spent driving. That pay practice is not questioned here.

The problem arises when the driver discovers a defect which under the regulations must be corrected before the actual trip begins. In such a case the driver is required to drive the rig to the Company's nearby repair facility, to "punch in" again on the same or another time clock, and to remain on the premises until the defect in his vehicle is remedied. He then "punches out" and commences his trip. He is paid for the time spent between the second "punch-in" and the second "punch-out," but he is not paid for the time between the first "punch-out" and the second "punch-in." The bone of contention here is the policy of ABF not to pay for the time in question, a policy that was ultimately upheld by the joint grievance committee.

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[3] The district court rejected the defense contention that the four plaintiffs, other than Barrentine and Scates, could not maintain their action because of failure to exhaust the grievance procedure called for by the collective bargaining agreement. That contention has not been renewed here.

During one of the "work periods" in controversy here the driver is required to locate his vehicle, evaluate its condition from the standpoint of safety, and if he finds it defective to drive it to the repair facility. The lengths of these uncompensated periods naturally vary to some extent, but in the nature of things they are not prolonged.

Count I of the complaint is based on the Fair Labor Standards Act, and federal jurisdiction is predicated upon § 16(b) of that Act, 29 U.S.C. § 216(b). The position of plaintiffs is that the time here in controversy is recognized as compensable time by § 4(b) of the Portal-To-Portal Pay Act, *supra,* and that under § 16(b) of the Fair Labor Standards Act plaintiffs are entitled to double damages, to be ascertained by a proper accounting, plus costs and a reasonable attorney's fee.

Count II is based on the Labor Management Relations Act of 1947 that has been mentioned, and federal jurisdiction is predicated on § 301 of that Act, 29 U.S.C. § 185. The charge is that the Union breached its duty to represent the plaintiffs fairly in connection with their controversy with ABF. The heart of the charge is to be found in paragraphs 5 and 6 of Count II, which we set out in full.

> 5. The collective bargaining agreement referred to in COUNT ONE, above, and attached hereto as "Exhibit A", provides for all employees to be paid from the time the employee is ordered to report for work and register in, and ceases at the time they are effectively released from duty. Also, as alleged in COUNT ONE, above, plaintiffs have been refused any pay whatsoever by defendant ABF for the time sought by plaintiffs, and such time has been spent in ABF's service after reporting for work and first registering in. ABF has repeatedly rejected demands of plain-

tiffs for pay for this time. Plaintiffs, and others similarly situated, have repeatedly sought aid and assistance from the defendant Local 878 for their grievances, and have been repeatedly rejected. Plaintiffs allege defendant Local 878 has breached its duty of full and fair representation to plaintiffs by its failure to process their grievances.

6. Plaintiffs have exhausted all other remedies in that defendant Local 878 has refused them full and fair representation with their grievances, and continued and further attempts to seek such would be futile.

Prior to trial the parties entered into a rather full stipulation including a stipulation as to the issues of fact and law that the district court would be required to decide. As far as Count II of the complaint is concerned, the pertinent provisions of the stipulation are as follows:

E. Are the terms of the bargaining agreement binding upon the plaintiffs and are they estopped from proceeding under 29 U.S.C. § 185?

F. Have the defendants breached their duty of fair representation owed to the plaintiffs?

G. Would it have been futile for all plaintiffs to attempt to resolve their complaints through the grievance procedure of the collective bargaining agreement?

H. Has defendant ABF breached the collective bargaining agreement by not paying drivers for the time required to inspect their vehicle and transport it to the repair garage?

At the conclusion of the trial Judge Arnold announced

his decision from the bench, and his announcement amounted to an opinion incorporating his findings of fact and conclusions of law. Materials before us include a transcript of those findings and conclusions, and we have given them careful consideration. As to the findings of fact, we are required to accept them unless clearly erroneous as that term is now commonly understood. Fed. R. Civ. P. 52(a).

The district judge found that if Article 50 of the Agreement were to be read literally, the time in controversy here would be considered as compensable time since although it was the personal responsibility of the drivers to inspect their vehicles before taking them on the road, the initial inspection of the vehicles and the taking of them to repair facility were actions taken in the interest of the employer. There can be little quarrel with that finding.

The district judge also found, however, that collective bargaining contracts are in certain respects *sui generis*, that provisions relative to compensable time are not always to be construed literally, and that in practice there may be room for some elasticity in determining whether a given preliminary or postliminary work activity should be considered as compensable under a given collective bargaining agreement.

Proceeding, the district court found that in industry practice Article 50 of the Agreement has not been construed literally as far as safety inspection time is concerned, and that there is some difference in construction and application between truckers. As far as the ABF Little Rock terminal is concerned, the variance from the literal wording of Article 50 has been tolerated by the Union perhaps as a result of an alleged side agreement between ABF and Odell Smith who for many years was president of Local 878.

The district court held that the controversy about the safety inspection time was properly submitted to arbitration, that the Union breached no duty of representation that it owed to its members, that the awards were legitimate ones and were not tainted by any improper side agreement between ABF and Smith, if there was such an agreement. The court also felt that the awards were binding on all six plaintiffs, and that the complaint of all of them should be dismissed, which was done.

For reversal as to Count I appellate counsel for plaintiffs insist that their claims under the Portal-To-Portal Pay Act were separate and distinct from their claims for compensation under Article 50 of the Agreement, and that the statutory claims should be considered on their merits without regard to the results of the arbitration proceedings.

As to Count II, plaintiffs complain of the awards of the joint committee on a number of grounds.

Basically, plaintiffs contend that it is unfair and contrary to federal labor policy to have individual employee grievances finally arbitrated by a grievance committee made up of representatives of both management and labor unions; that the awards made are squarely contrary to the terms of Article 50 of the Agreement; that the interpretation placed on the contract by the grievance committee is contrary to federal highway safety policy; and, finally, it is contended that the Union did not represent the grievants fairly and in good faith, and that the awards were tainted by the alleged side deal between ABF and Smith.

For affirmance, the defendants urge that some of the contentions of plaintiffs were not advanced in the district court and should not be considered on appeal for the first time. Defendants also contend that all of the complaints

of plaintiffs are, in any event, without merit, and that the decisions of the arbitrators effectively disposed of the respective claims of all of the plaintiffs set out in both Count I and Count II of the complaint.

I.

While the district court did not discuss the two counts of the complaint separately, it is not to be supposed that the court was not aware of the two counts, as such, and was not aware that one of them was based on the Portal-To-Portal Pay Act, and that the other was based on the collective bargaining agreement.

In stating his findings and conclusions the district judge made specific reference to § 203(d) of the National Labor Relations Act, 29 U.S.C. § 173(d). That section is part of Title II of the statute which deals with conciliation of labor disputes and that establishes the Federal Mediation and Conciliation Service, 29 U.S.C. § 171 *et seq.*

Section 203(d) provides that final adjustment "by a method agreed upon by the parties is declared to be the desirable method for settlements of grievance disputes." From that provision the district court concluded that wage disputes arising under the FLSA, as amended and supplemented, may be the subject of binding arbitration where the collective bargaining agreement so provides. We agree, at least in situations in which employees knowingly and voluntarily submit their grievances to arbitration under the terms of the agreement.

Here, the parties to the Agreement are the respective trucking companies, on one hand, and the Teamsters Union and its locals on the other hand. Those parties have agreed that individual employee grievances are to be settl-

ed finally by arbitration under the procedure that we have described.

The position of the plaintiffs is that they may proceed in the federal court on the basis of their statutory claim, notwithstanding the fact that the arbitration proceedings disposed of their contract claims which are coextensive with their statutory wage claims.

Plaintiffs rely heavily on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Plaintiffs also cite *Leone v. Mobil Oil Corp.*, 523 F.2d 1153 (D.C. Cir. 1975), and *Thompson v. Iowa Beef Packers, Inc.*, 185 N.W.2d 738 (Ia. 1971), *cert. dismissed,* 405 U.S. 228 (1972).

Gardner-Denver was a Tenth Circuit case that arose under Title VII of the Civil Rights Act of 1964 and not under the FLSA. It was there held that a person claiming to have been the victim of racial discrimination in employment under the terms of a collective bargaining agreement calling for arbitration of grievances was not put to an election between his contract remedy and his right of action under Title VII, and that an initial resort to arbitration did not prevent him from filing suit under the statute.

The same court of appeals that decided *Gardner-Denver* initially also decided *Satterwhite v. United Parcel Service, Inc.*, 496 F.2d 448 (10th Cir.), *cert. denied,* 419 U.S. 1079 (1974). *Satterwhite* was decided shortly after the Supreme Court decided *Gardner-Denver,* and the court of appeals was well aware of that decision. The court of appeals distinguished a simple wage claim of an employee and an employee claim of racial discrimination prohibited by the 1964 Civil Rights Act. It was held that where an employee involved in a wage dispute voluntarily submits a grievance under the collective bargaining agreement, and where the grievance goes to final arbitration, and the employee loses,

he cannot turn around and commence a suit under § 16(b) of the FLSA.

We think that the *Satterwhite* distinction is sound. In a context of racial discrimination the right of an employee to be free from such discrimination may well be thought to stand in more need of protection than conventional arbitration of a simple wage dispute may provide.

Satterwhite was cited with approval in *Union de Tronquistas de Puerto Rico Local 901 v. Flagship Hotel Corp.*, 554 F.2d 8, 11 (1st Cir. 1977).[4] *See also Bell v. IML Freight, Inc.*, 589 F.2d 502, 504 (10th Cir. 1979); *Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692, 695 (10th Cir. 1977).

Thompson v. Iowa Beef Packers, Inc., supra, and *Leone v. Mobil Oil Corp., supra,* hold that where an employee has a claim under the FLSA which is also subject to arbitration under a collective bargaining agreement, he is not required to exhaust his remedies under that agreement, including final arbitration, before filing his suit under § 16(b).

Those holdings might well give us trouble here, at least with respect to the four plaintiffs who never filed grievances and never submitted their claims to arbitration except for the manner in which the case was handled in the district court.

We have mentioned the fact that the district court rejected the defense claim that the four men in question could not proceed in the case since they had not exhausted their contract remedies. In so doing, the district court stated that it was doing so on the ground that it would

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[4]Our former colleague, the late Judge Van Oosterhout of Iowa, sitting in the First Circuit by designation, wrote for the court.

have been a futile gesture for the four men in question to have filed grievances and gone to arbitration in view of the action that the grievance committee had already taken in the cases of Barrentine and Scates. And the district judge stated specifically that he was "treating the case as though each of the named plaintiffs had actually filed grievances which were considered and denied."

Trial counsel for plaintiffs did not object to that approach, and appellate counsel have not undertaken in connection with this appeal to differentiate the Count I claims of Barrentine and Scates from the Count I claims of the other four plaintiffs.

We conclude, therefore, on this phase of the case that if the district court correctly disposed of the Count II claims, then Count I falls with Count II.

II.

We consider, next, plaintiffs' claim that to uphold the award in this case would seriously offend a strong public policy of the government that the vehicles of motor carriers be safety inspected and, where necessary, be placed in a safe condition before the vehicles are put on the highways.

Assuming, contrary to the contention of the defendants, that this claim is properly before us, we find it to be without merit.

No one would deny that such a policy exists, and that it is a legitimate and a strong one. The policy, however, relates to the condition of the vehicles and does not amount to a requirement that the drivers who are required to make the inspections in advance of trips be paid for the short periods of time required to make the inspections and

drive the vehicles to nearby facilities when found to be in need of repair. After all, the policy is designed for the welfare of the drivers as well as for the benefit of employers and third party members of the traveling public.

III.

Before discussing the validity of the particular arbitration awards that were made in this case, we will take up the plaintiffs' underlying argument that it is inherently unfair and contrary to federal labor policy to submit individual employee grievances to arbitration by panels made up of representatives of management and organized labor even though an effort to achieve impartiality is made by a requirement that neither the employer nor the local union involved in the particular dispute to be submitted is to be represented on the arbitration panel.

While the defendants strongly urge that this contention is not properly before us for consideration, we will assume *arguendo* that it is.

A forceable argument can be made, and has been made here, that the kind of arbitration in question is subject to grave abuses, including, notably, collusive secret agreements between employers and unions as a result of which the interests of individual employee grievants may be sacrificed to arrangements that management and union labor may consider to be in their own broader interests.

This method of arbitration, which is widely used to settle individual employee grievances arising under contracts to which locals of the Teamsters Union are parties, has been criticized on account of the possibility of abuses just mentioned. *See General Drivers & Helpers Union, Local No. 554 v. Young & Hay Transp. Co.*, 522 F.2d 562, 567,

n.5 (8th Cir. 1975). *See also* Feller, "A General Theory of the Collective Bargaining Agreement," 61 Cal. L. Rev. 663, 836-38 (1973); Azoff, "Joint Committees As An Alternative Form of Arbitration Under The NLRA," 47 Tul. L. Rev. 325 (1973).

However, as of this time the law seems to be established that the joint committee method of arbitration is valid, and that committee awards are final and enforceable so long as the unions involved do not breach the duty of fair representation owed to union members and so long as the awards do not radically depart from the terms of the collective bargaining agreements involved. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Humphrey v. Moore*, 375 U.S. 335 (1964); *General Drivers, Warehousemen & Helpers Local Union No. 89 v. Riss & Co., Inc.*, 372 U.S. 517 (1963).

In view of this state of the law plaintiffs' attack on joint committee arbitration in general must be rejected.

IV.

Finally, there remains to be considered the claims of the plaintiffs that the Union breached its duty of fair representation, that the award flies in the face of Article 50 of the Agreement, and that the awards of the committee were tainted by a collusive side deal between ABF and former president Smith of Local 878.

In evaluating those claims we must recognize at the outset that it is not our function to substitute judicial views for those of an arbitrator as far as the merits of the controversy are concerned, *Hines v. Anchor Motor Freight, Inc., supra,* 424 U.S. at 562-63, and that arbitration as a method for the peaceful settlement of labor disputes arising in or affecting interstate commerce has

been a favorite of the federal courts since at least 1957 when the Supreme Court decided *Textile Workers Union of America v. Lincoln Mills,* 353 U.S. 448 (1957). *See also* the familiar "Steelworkers Trilogy." *United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

As to the claim of the plaintiffs that the awards in question impermissibly violate the terms of Article 50 of the Agreement, it is sufficient for us to say that we agree with the district court that given the flexibility that must be accorded to collective bargaining agreements, the exclusion of the short periods of work activity involved in this case from compensable time under Article 50 was not such a departure from the terms of the agreement as to nullify the awards.

The questions raised by the other claims that we are now considering were primarily factual, and the district court resolved them adversely to the plaintiffs.

The district court found that during the overall period of controversy that began about 1969 there was a good deal of animosity between Barrentine, Scates and perhaps other ABF drivers and President Smith of Local 878 that extended until Smith was defeated for reelection by the defendant Pickering. While the district judge made no firm finding on the matter, he thought it probable, and he assumed that there had been a side deal of some sort between ABF, on one hand, and Mr. Smith on the other. The district court was unable to find that there was anything improper or collusive in the agreement, if there was one, but the court for purposes of decision appears to have

assumed to a limited extent the existence of at least some degree of impropriety.

The court found, however, with respect to the presentation of the grievances to the joint grievance committee the Union had not breached any duty owed to its members and had not presented the grievances in a merely perfunctory or pro forma manner, and the district judge found that the awards directly involved and, indeed, earlier awards had not been tainted by any improper agreement between ABF and Smith, if there was one.

In sum, Judge Arnold found that the awards adverse to the plaintiffs were valid and were binding upon them, and that the case had to be dismissed in its entirety as to all six plaintiffs.

Counsel for plaintiffs do not challenge the factual findings of the trial court, and certainly they were not clearly erroneous. We likewise think that the trial court's conclusions of law were permissibly based on the record before it and do not represent error.

As indicated, if Count II of the complaint goes down, Count I falls with it. Accordingly, we affirm the judgment of the district court as to both counts.

HEANEY, Circuit Judge, dissenting.

I dissent from that portion of the majority opinion holding that the validity of the plaintiffs' claim under the Fair Labor Standards Act (FLSA), 29 U.S.C. §201, *et seq.*, depends upon the validity of their claim under the collective bargaining agreement. In my view, the Supreme Court's conclusions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), regarding Title VII claims apply with equal force to claims arising under FLSA; an employee's FLSA claim is not precluded by prior submission of his

claim to arbitration under a collective bargaining agreement, unless the parties clearly and specifically consented to have the FLSA claim decided by the arbiters.

In this case, there was no intent to submit the FLSA claim to arbitration and it was not submitted to arbitration. Accordingly, I would remand to the district court for a determination of the validity of plaintiffs' FLSA claim.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1480 September Term, 1979

Lloyd Barrentine; Clyde G. Edwards; Cleo Keeney; Maxie Blanton; Johnny Robinson; J.N.Scates; Charley Deaton; H.E.Mittchell and L.R. Young,
Appellants,

vs.

Arkansas-Best Freight System, Inc.; International Brotherhood of Teamsters, Chauffeurs and Warehousemen, Local 878, A.J. Pickering, President,
Appellees.

APPEAL FROM the United States District Court for the Eastern District of Arkansas.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the Eastern District of Arkansas and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed in accordance with the opinion of this Court.

February 20, 1980

Cost taxed in favor of appellee:

Cost of printing 5 copies of brief:	$20.25
Total costs of appellee for recovery from appellant in the U.S. District Court	$20.25

(PLEASE PAY COST DIRECTLY TO PARTIES INVOLVED)

A true copy: /s/ Robert D. St. Vries

Attest: /s/ by Linda Landiochi, Deputy Clerk
Clerk, U.S. Court of Appeals, Eighth Circuit

DATED: March 18, 1980

RECEIVED
NOV 20 1980
CLERK
SUPREME COURT, U.S.

No. 79-2006

IN THE

Supreme Court of the United States

October Term, 1979

LLOYD BARRENTINE, CLYDE G. EDWARDS, CLEO KEENEY, MAXIE BLANTON, JOHNNY ROBINSON, CHARLEY DEATON, H.E. MITTCHELL, AND L.R. YOUNG,
Petitioners,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN, LOCAL 878, AND A.J. PICKERING, PRESIDENT,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

PETITION FOR WRIT OF CERTIORARI FILED JUNE 19, 1980
CERTIORARI GRANTED OCTOBER 6, 1980

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-2006

LLOYD BARRENTINE, CLYDE G. EDWARDS, CLEO KEENEY, MAXIE BLANTON, JOHNNY ROBINSON, CHARLEY DEATON, H.E. MITTCHELL, AND L.R. YOUNG,

Petitioners,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN, LOCAL 878, AND A.J. PICKERING, PRESIDENT,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Complaint 3

Answer of Defendant Arkansas-Best Freight System, Inc. 9

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

Grievance Report filed by L. B. Barrentine 19

Relevant Provisions of the Southern Conference Area Over-the-Road Motor Freight Supplemental Agreement 22

Article 43, Grievance Committees 22

Article 44, Grievance Machinery and Union Liability 24

Article 50, Paid-for Time General 27

Arkansas-Best Freight System, Inc. Bulletin of July 13, 1962 31

Arkansas-Best Freight, System, Inc. Bulletin of June 9, 1960 32

Answers to Interrogatories Propounded to Plaintiff Cleo Keeney 34

Answer to Interrogatories Propounded to Plaintiff Lloyd Barrentine 35

Answers to Interrogatories Propounded to Plaintiff Charley Deaton 37

Answers to Interrogatories Propounded to Plaintiff Maxie Blanton 38

Answers to Interrogatories Propounded to Plaintiff H. F. Mittchell 40

Answers to Interrogatories Propounded to Plaintiff J. N. Scates 41

Pre-Trial Stipulation 43

Judgment of the District Court 51

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LLOYD BARRENTINE, CLYDE G. EDWARDS, CLEO KEENEY, MAXIE BLANTON, JOHNNY ROBINSON, J.N. SCATES, CHARLEY DEATON, H.E. MITTCHELL, and L.R. YOUNG,

Plaintiffs,

vs.

CIVIL CASE
77-C-85

ARKANSAS-BEST FREIGHT SYSTEMS, INC. and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 878, A.J. PICKERING, President,

Defendants.

RELEVANT DOCKET ENTRIES

Date	Pleadings, etc.	Page
3/23/77	Complaint filed and summons handed to marshals	6
4/11/77	Answer of Arkansas-Best Freight Systems, Inc.	20
11/24/78	Motion for Summary Judgment on behalf of defendant	94
11/24/78	Brief in Support	116

12/15/78	Reply to Motion for Summary Judgment	117
12/27/78	Order (Arnold) denying motion for summary judgment	130
5/01/79	Answers to interrogs to Cleo Keeney	220
5/01/79	Answers to interrogs to Lloyd Barrentine	226
5/01/79	Answers to interrogs to Charley Deaton	228
5/01/79	Answers to Interrogs to Maxie Blanton	235
5/01/79	Answers to interrogs to H.E. Mittchell	238
5/01/79	Answers to interrogs to J.N. Scates	248
5/07/79	Judgment (Arnold)	259
6/4/79	Notice of appeal by pltfs	260
6/4/79	Cash Costs Bond on appeal	261
8/13/79	Designation of record by appellant	263
8/22/79	Designation by the appellee Ark.-Best Freight System of additional parts of the proceedings to be included in the record	265
8/28/79	Reporter's partial transcript, opinion of the court	Not Under
8/28/79	Designation by the appellees Chauffeurs, Teamsters & Helpers Local Union No. 878	267
8/30/79	Amendment statement of issues	268
9/6/79	Objection of appellee, ABF System, Inc. to amendment by appellant of issues to be raised on appeal	269
9/10/79	Appellants' reply to ABF's objection to appellants' amending their designated issues on appeal	272
3/20/80	Opinion (8 USCA)	281
3/20/80	Mandate (8 USCA) judgt. affirmed.	282
6/27/80	Notice of filing petition for writ of certiorari	283

IN THE
United States District Court
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

[Caption omitted in printing]

[Filed March 23, 1977]

COMPLAINT

Plaintiffs for cause of action state:

1. Plaintiffs first filed this cause of action June 28, 1973 in this court Civil Case Number LR-73-C-159 which case was dismissed without prejudice March 23, 1976. Complaint in said case was as follows:

COMPLAINT

COUNT ONE:

1. The above named plaintiffs, employees of defendant, Arkansas-Best Freight Systems, Inc. (hereinafter referred to as "ABF"), and are members of International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America, Local 878 (hereinafter referred to as "Local 878"), bring this action in behalf of themselves and other employees of ABF and members of Local 878 who are similarly situated, to recover unpaid minimum wages, liquidated damages, costs and attorney fees under provisions of 29 USC 216(c).

2. Jurisdiction of this action is conferred on this court by said 29 USC 216(b) and by the provisions of 28 USC 1337, relating to "any civil action or proceeding arising under any Act of Congress regulating commerce."

3. Defendant ABF is a corporation organized under the laws of the State of Arkansas, with its principal place of business in Fort Smith, Arkansas, and it also operates a large freight terminal in Pulaski County, Arkansas, within the territorial jurisdiction of this court, and, at all times hereinafter mentioned, employed plaintiffs and others similarly situated.

4. At all times hereinafter mentioned, defendant ABF was engaged in the business of hauling freight by vehicles across State lines throughout the United States. During the period April 1, 1970 to the present date, or during portions of such period, ABF employed plaintiffs and others similarly situated, as operators of their vehicles engaged in interstate commerce. In performance of their employment they fall within the meaning of 29 USC 203(b), 203(i), 203(j) and 206(a).

5. Plaintiffs are residents of Pulaski County, Arkansas, and reside within the territorial jurisdiction of the Eastern District of Arkansas.

6. Local 878 is bargaining agent for plaintiff and others similarly situated, under a collective bargaining agreement between the Union and ABF for the period April 1, 1970 through June 30, 1973, and as such owed to them the duty of fair representation in pressing any grievance plaintiffs' might have against ABF.

7. In the course of plaintiffs' employment with ABF they are notified of the time to report for work and to register in at the Little Rock truck terminal. Upon arrival, plaintiffs first "punch in" on a time clock. Then, in accordance with § 292.7 Department of Transportation Safety Regulations, plaintiffs' must inspect the vehicle to which they are assigned to determine parts and/or accessories are in good working order. If satisfied of the good working

order of said vehicle, plaintiffs are then to proceed on their assigned trip, and are paid by defendant ABF from the time originally "punched in". If, however, plaintiffs should determine defects exist in the working parts or accessories, they then must transport the vehicle to ABF's repair garage for the needed corrections. Upon arrival at the repair garage, plaintiffs are again required to "punch in" on a second time clock. After and needed repairs or corrections have been made to the vehicle, plaintiffs are them permitted to continue with their assigned trip. However, in this situation they are paid only from the time they "punched in" at the second time clock. The intervening time period between the first and second time being on the average approximately 15 minutes. Plaintiffs, and others similarly situated, have repeatedly made demands upon defendant ABF for the approximate 15 minutes time in the service of ABF, and defendant ABF has willfully refused to pay any sums to plaintiffs for this period.

8. The foregoing actions by defendant ABF has continued throughout the length of aforementioned collective bargaining agreement. Plaintiffs and others similarly situated have repeatedly sought full and fair representation of their grievances as outlined above from and by Local 878, and have been denied such.

9. Until plaintiffs obtain discovery of defendant ABF's records, they are unable to state the exact amount owing to them, and to others similarly situated, by defendant ABF's refusal to pay at least a minimum wage for such time while in defendant's service. However, plaintiffs estimate, and therefore allege, the sums due them and others similarly situated, to be in excess of $20,000.00.

10. If the activities, or any portion thereof, for which plaintiffs seek to recover minimum wages herein, were

preliminary to the principal activities in which they were engaged, then, and in only such event, plaintiffs allege that such preliminary activities were compensable by a written contract in effect at the time of such activities between defendants ABF and Local 878, with the plaintiffs beneficiaries thereof. A copy of said written contract is attached hereto and identified as "Exhibit A", and is incorporated into these pleadings. The provision of said contract under which the activities were compensable are found in Article 50, Sections 1 and 2, on pages 140 and 141 of said exhibit. Plaintiffs further allege a custom and practice in effect during the stated period of time, in that ABF working under this same written contract at other terminals they operate did pay drivers for this time. In addition, competitors of ABF who are parties to the same contract with Local 878 customarily pay for the time in question. Inasmuch as the foregoing activities of plaintiffs were engaged in during the portion of the day to which they were so made compensable, then defendant is not relieved for liability for such activities under the provisions of 29 USC 254.

11. All plaintiffs herein, with the exception of Floyd Cockrum and A. H. Pickering, file herewith their written consent to the bringing of this cause of action. It is anticipated Cockrum and Pickering shall shortly do the same. Said written consent is attached to this pleading and marked "Exhibit B".

WHEREFORE, plaintiffs pray judgment against defendants ABF and Local 878 in the amounts respectively due plaintiffs and others similarly situated, for at least minimum wages, for liquidated damages and costs under the provisions of the Fair Labor Standards Act of 1938, as amended, and that this court also allow a reasonable at-

torney fee to be paid by defendants, and for any and all other proper relief.

COUNT TWO:

1. Plaintiffs bring action under this count in behalf of themselves and other employees and union members similarly situated, of defendant ABF and defendant Local 878, under 29 USC 185.

2. Jurisdiction of action under this count is conferred on this court by said 29 USC 185 and by 28 USC 1337.

3. Allegations of COUNT ONE, above, are incorporated herein by reference, and become allegations under this count.

4. Plaintiffs, and other employees of defendant ABF similarly situated, are members of Local 878, which maintains its' office in Little Rock, Arkansas. Odell Smith is president of said Local 878.

5. The collective bargaining agreement referred to in COUNT ONE, above, and attached hereto as "Exhibit A', provides for all employees to be paid from the time the employee is ordered to report for work and register in, and ceases at the time they are effectively released from duty. Also, as alleged in COUNT ONE, above, plaintiffs have been refused any pay whatsoever by defendant ABF for the time sought by plaintiffs, and such time has been spent in ABF's service after reporting for work and first registering in. ABF has repeatedly rejected demands of plaintiffs for pay for this time. Plaintiffs, and others similarly situated, have repeatedly sought aid and assistance from the defendant Local 878 for their grievances, and have been repeatedly rejected. Plaintiffs allege defendant Local 878 has breached its duty of full and fair representation to plaintiffs by its failure to process their grievances.

6. Plaintiffs have exhausted all other remedies in that defendant Local 878 has refused them full and fair representation with their grievances, and continued and further attempts to seek such would be futile.

7. Until plaintiffs obtain discovery of defendant ABF's records, they are unable to state the exact amount owing to them, and to others similarly situated, by reason of defendant ABF's failure to pay for time in its service, and for defendant Local 878's failure in its duty of full and fair representation. However, plaintiffs estimate, and therefore allege, the sums due them and others similarly situated, to be in excess of $200,000.00.

WHEREFORE, plaintiffs pray judgment against defendants ABF and Local 878, jointly and collectively, in the amount due them for breach of the collective bargaining agreement, and for failure to provide fair representation, for costs, and that this court also allow a reasonable attorney fee to be paid by defendants, and for any and all other proper relief."

2. Plaintiffs adopt foregoing complaint and exhibits thereto as part of this complaint, along with prayers for damages. Since date of said complaint Odell Smith is no longer president, and this complaint substitutes A. J. Pickering.

3. Actions enumerated in said complaint have continued since that date, and are continuing to date.

WHEREFORE, plaintiffs pray damages as set forth above, and any and all other relief.

JOSH E. McHUGHES &
J. H. COTTRELL
Attorneys for Plaintiffs
BY:J. H. Cottrell

[Jurat omitted in printing]

STATE OF ARKANSAS]
] ss. VERIFICATION
COUNTY OF PULASKI]

IN THE
United States District Court
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

[Caption omitted in printing]

ANSWER OF ARKANSAS-BEST FREIGHT SYSTEM, INC.

Comes the defendant, Arkansas-Best Freight System, Inc., and for its Answer states:

COUNT ONE:

I.

Admits the allegations contained in paragraph 1, except denies that the plaintiffs have any right or standing to bring this action on behalf of themselves or any other employees of this defendant.

II.

Denies that any jurisdiction is conferred on the Court by 29 U.S.C. 216(b). States that 29 U.S.C. 216(b) confers no substantive rights. Pleading further, this defendant, states that 28 U.S.C. § 1337 in and of itself confers no jurisdiction upon the Court, and that the plaintiffs' failure to allege the jurisdictional basis of the Court is fatally defective. Pleading further, that the plaintiffs have failed to comply with Rule 8(a) of the Federal Rules of Civil Procedure. That the defendant is unable to determine upon what jurisdictional basis the action is commenced and the Complaint of the plaintiffs should be dismissed for failure to so comply. Pleading further, this defendant states that the plaintiffs are improper parties and have no standing to commence the captioned action on account of their failure to comply with the requirements of 29 U.S.C. § 216(b) in that no plaintiff has filed a consent in writing to become a party to this action, as required by law.

III.

Admits the allegations of paragraph 3.

IV.

Admits the allegations of paragraph 4.

V.

Has no knowledge as to the allegations of paragraph 5 of the Complaint, and therefore denies same.

VI.

Admits the allegations of paragraph 6.

VII.

Admits the plaintiffs are notified of the time to report for work and register in at the Little Rock truck terminal. Admits the plaintiffs are required to "punch in" on a time clock upon arrival. Admits that plaintiffs must inspect the vehicles to which they are assigned after they arrive at the terminal. Admits, if the plaintiffs are satisfied of the good working order of the vehicle, they are then required to proceed on their assigned trip. Denies that the plaintiffs are are paid by the defendant from the time originally "punched in," and states affirmatively that the plaintiffs are paid by this defendant on a rate-per-mile and are not paid on a rate-per-hour basis. Admits, if the plaintiffs determine safety defects in their vehicles, they then transport same to the repair garage for corrections. Admits upon arrival at the repair garage plaintiffs are required to "punch in" on a second time clock. Admits after repairs have been made the plaintiffs required to continue with their assigned trip. States that the plaintiffs are required to "punch out" on the time clock at the repair garage upon the completion of necessary repairs before commencing their assigned trip. States that plaintiffs are paid at a minimum guaranteed hourly rate between the time they "punch in" at the repair garage and the time they "punch out" at the repair garage. Denies that the intervening time period from "punching in" at the terminal office to "punching in" at the repair shop constitutes approximately 15 minutes. Admits that some of the plaintiffs have made demand upon this defendant for payment of the time commencing when the plaintiffs punch into the terminal and time plaintiffs punch into the repair shop; denies that some of the plaintiffs have made such demands; denies that others similarly situated have made such demands. States that this defendant has consistently

refused to pay any sums to plaintiffs for the time involved, but denies that such refusal is willful, and states that such refusal is permitted and provided for pursuant to the collective bargaining agreement to which this defendant and the plaintiffs are parties. Denies all other allegations of paragraph 7.

VIII.

Admits this defendant has consistently followed the conduct set forth above. Denies that any of the plaintiffs, except Lloyd Barrentine and J. N. Scates, have sought any representation of their grievances from and by Local 878. Denies that any of the plaintiffs have been denied full and fair representation of their grievances concerning the foregoing allegations by Local 878. States that Local 878 has fully and fairly represented the plaintiffs in connection with the captioned matter at all times when demand for such representation has been made.

IX.

Denies the allegations of paragraph 9.

X.

Denies the allegations of paragraph 10. Pleading further, this defendant states that the plaintiffs have failed to attach a copy of the contract upon which the allegations of paragraph 10 are based to the copy of the Complaint served upon this defendant. That plaintiffs should be required to serve Exhibit A upon this defendant, or in the alternative, their Complaint should be dismissed.

XI.

Denies the allegations contained in paragraph 11 and states that Exhibit B has not been filed with the Court nor a copy of same served upon this defendant. That the failure to file said Exhibit B is fatal to the action of the plaintiffs, and same should be dismissed.

WHEREFORE, defendant prays that the Complaint of the plaintiffs be dismissed, and that they take nothing thereby.

COUNT TWO:

I.

Denies that the plaintiffs have standing to bring this action in behalf of themselves or other employees and union members similarly situated. Pleading further, this defendant states that the plaintiffs' allegations as to the identity of the alleged other union members is so vague as to be void, and said allegations should be stricken.

II.

Denies the allegations of paragraph 2.

III.

Denies the allegations of paragraph 3.

IV.

Denies the allegations of paragraph 4.

V.

States that the plaintiffs failed to attach "Exhibit A" to the Complaint, and that all allegations concerning Exhibit A should be stricken until such time as Exhibit A is attach-

ed or in the alternative the Complaint should be dismissed. Denies all other allegations contained in paragraph 5.

VI.

Admits that the plaintiffs Barrentine and Scates have exhausted all other remedies, as more fully set out hereinafter, but denies that any of the other plaintiffs have exhausted their other remedies, and states that as to such other plaintiffs this action is untimely and premature, as more fully set out hereinafter. Pleading further, this defendant denies that the plaintiffs have been refused fair and full representation and that further attempts to seek such would be futile.

VII.

Denies the allegations of paragraph 7.

WHEREFORE, this defendant prays that the Complaint of the plaintiffs be dismissed, and that they take nothing thereby.

Plaintiff admits the allegations of paragraph 1 of the Complaint filed March 23, 1977, but denies the allegations of paragraphs 2 and 3 of said Complaint.

DEFENSES

I.

29 U.S.C. §254, the Portal-To-Portal Pay Act provides that no employer shall be subject to any liability under the Fair Labor Standards Act of 1938, As Amended, the Walsh-Healey Act, or the Bacon-Davis Act on account of the failure of the employer to pay an employee a minimum wage or to pay an employee overtime compensation, for

any activities which are preliminary to the principal activity of the employee if same occurs on or after May 14, 1947. The principal activities of the plaintiffs consist of driving trucks loaded with freight in interstate commerce. The inspection of the vehicles driven by the plaintiffs are preliminary to such principal activities, and the plaintiffs' claims herein are barred on account thereof.

II.

At all times material herein, the plaintiffs were members of Teamsters Local Union #878, Little Rock, Arkansas; that Teamsters Local Union #878 for itself and for and on behalf of its members, including the plaintiffs, entered into the National Master Freight Agreement and the Southern Conference Area Over-The-Road Supplemental Agreement, herein referred to as the "Collective Bargaining Contract," to which the defendant was also a party. This Collective Bargaining Contract governs the rights and duties of the plaintiffs and the defendant hereunder. All of the plaintiffs have accepted, at all times material, the benefits provided by the Collective Bargaining Contract.

Article 44 of the Collective Bargaining Contract provides, and at all times material herein provided, that any controversy arising thereunder shall be resolved by and through the grievance procedure established therein. Said Article further provides that the decision rendered as a result of the grievance proceeding shall be final and binding on both parties.

III.

A. At the request of the plaintiff Barrentine, pursuant to Article 44 of the Collective Bargaining Contract, Local 878 filed formal grievance complaints for plaintiff Barren-

tine's benefit against the defendant Arkansas-Best Freight System, Inc. with the Southern Conference Grievance Committee upon the same facts as set forth in the Complaint; and hearings were had on such complaints as follows:

(i) Case #686
(a) Local 878 files formal complaint with Southern Conference Grievance Committee 12-22-69
(b) Hearing and Decision 1-26-70

(ii) Case #167
(a) Local 878 files formal complaint with Southern Conference Grievance Committee 1-8-70
(b) Hearing and Decision 5-11-70

(iii) Case #166
(a) Local 878 files formal complaint with Southern Conference Grievance Committee 1-22-70
(b) Hearing and Decision 5-11-70

(iv) Case #683
(a) Local 878 files formal complaint with Southern Conference Grievance Committee 1-22-70
(b) Hearing and Decision 5-11-70

(v) Case #392
(a) Local 878 files formal complaint with Southern Conference Grievance Committee 12-12-75
(b) Hearing and Decision 1-19-76

B. At the request of the plaintiff Scates, pursuant to Article 44 of the Collective Bargaining Contract, Local 878 filed a formal grievance complaint for Scates' benefit against the defendant Arkansas-Best Freight System, Inc. with the Southern Conference Grievance Committee upon the same facts as set forth in the Complaint; and a hearing was had on such complaint as follows:

(i) Case #549
(a) Local 878 files formal complaint with Southern Conference Grievance Committee 12-7-76
(b) Hearing and Decision 1-18-77

Each of the grievance committee decisions, as to Barrentine and Scates, held that the claims of each of such plaintiffs for additional compensation, as claimed in the plaintiffs' Complaint, was denied. In each instance, each plaintiff continued work pursuant to the terms of the Collective Bargaining Contract and this defendant complied with said final grievance decision in full.

IV.

Article 44 of the Collective Bargaining Contract further provides that there shall be no legal proceedings resorted to by either party without first using all possible means of settlement of disputes between the parties as provided in the Collective Bargaining Contract. The plaintiffs Edwards, Keeney, Blanton, Robinson, Deaton, Mittchell and Young are members of Local 878; have accepted the benefits of the Collective Bargaining Contract, and are subject to the burdens and limitations contained in said agreement. Such plaintiffs have failed and refused and continue to fail and refuse to abide by the terms, provisions and conditions of said agreement in that they have com-

menced this action without submitting their alleged grievances to the machinery provided for in the Collective Bargaining Contract. The said plaintiffs have failed to exhaust their remedies as provided and are barred from commencing or participating in this action.

V.

The plaintiffs, and each of them, are subject to the terms of the Collective Bargaining Contract; and the institution of this action by the plaintiffs constitutes a breach of said agreement. The plaintiffs come before the Court with unclean hands and by this action seek to do that which they by contract have agreed not to do. The plaintiffs' Complaint is without equity and should be dismissed on account thereof.

VI.

Pleading further, the defendant states that the plaintiffs' Complaint fails to state a claim upon which relief can be granted, and should therefore be dismissed.

VII.

Pleading further, the defendant states the plaintiffs' claims are each barred by the statute of limitations.

HARPER, YOUNG &
SMITH
P. O. Box 43
Fort Smith, AR 72902
By /s/ S. Walton Maurras
Attorneys for Defendant,
Arkansas-Best
Freight System, Inc.

DEFENDANT EXHIBIT LR-77-85

GRIEVANCE REPORT

CONTRACT AREA	EMPLOYEE CLASSIFICATION
☑ SOUTHERN CONFERENCE	☑ OVER-THE-ROAD
☐ CENTRAL STATES	☐ LOCAL CARTAGE
☐ EASTERN CONFERENCE	☐ GARAGE
☐ NATIONAL MASTER	☐ OFFICE
☐ FREIGHT AGREEMENT	☐

DEFENDANT'S EXHIBIT No. LR-C-77-85

L.B. Barretine	878	12-7-75
Grievant's Name	Local Union No.	Date of Violation

CLAIM: (attach copy of written complaint)
1/4 hr delay at L/Rock- From Clock Punch at disp. office to time clock punch at shop.

UNION'S POSITION: (use extra sheets if necessary)
See attached.

COMPANY'S POSITION: (describe facts in detail; attach all supporting documents)
Refer to bulletins dated 6-9-60, 7-13-62, attached
Previous cases denied on 1-26-70 and 5-11-70 see attached.

(Industrial Relations Departments Use Only)

Article No. 50 Type of Claim: Paid for time.
Committee Name: Southern multi
Hearing Date: 1-19-76
Case No. 342
Decision: Denied - cost to Union

Committee Members: Title, Alland, Pannel, Smith, Shelton, Hopkins

ABF No. 75-811 ABF Representative H. J. Johnson

COPY TO
COMPANY OFFICIAL:
Chairman, Opr. Comm. Jack Cheetz
Chairman, Union Comm. Howard Jones

Rd. Case X
City Case _____
Garage Case _____
Clerical Case _____
Dispatches _____

OFFICIAL GRIEVANCE REPORT
For Hearing By The
SOUTHWEST JOINT AREA COMMITTEE

878
J. B. Barrentine
Member

Arkansas Best Freight, Inc.
Little Rock, Arkansas
Address

Contract Violated: SW Area Over-the-Road
Article Violated: _____
State Briefly Nature of Complaint:
See Attached detailed (illegible)

This Claim is For: see attached
Date: 12/12/75 Agent's Signature_____(illegible)
Case No. _____ Date: _____
Disposition of Case: _____

MEMBER GRIEVANCE REPORT

Member's Name L. B. Barrentine Date 12-11-1975
Member's Address 7501 Redwood Dr. Little Rock
Phone 562-1091
Company Name: Arkansas Best Freight System, Inc.
Road:_X_City:____Garage:____Clerical:____
State Briefly Nature of Complaint: Claim for 1/4 hour delay time at L. R. on 12-7-75 that A.B.F. Driver Supervisor, N. A. Catter has notified me will not be paid. On 12-7 I clocked out at 5:23 AM. At the dispatch office then went out on the yard to my unit - 861-7992. The seat would not go back on 861 I could not even get in the tractor I walked to the shop and punched the shop clock at 5:31 a.m. The shop changed to 392 tractor and replaced a defective seal beam in 392 I clocked out on the shop clock at 5:51 a.m. I was on the clock working for A.B.F. from 5:23 a.m. until 5:51 a.m. a total of 28 minutes or 1/2 hr. I was only paid from the time I punched the clock inside the shop at 5:31 a.m. until 5:51 a.m. a total of 20 minutes or 1/4 hour. I am due an additional 1/4 hour for this delay time. Contract Article 50 specifies that our time will start from when we report to work and register in and that all time spent not driving shall be paid at the hourly rate. Federal Wage Laws also state that this is compensable time.
There is no way my mileage pay could start until after 5:51 a.m. Article 50 – also says we will be paid for all time spent in the service of the employer.
Note – If this grievance is denied I request a transcript of the hearing.
Member's Signature: L. B. Barrentine

CASE No. 392

878 – ABF – TIME CLAIM 1/4 HR 12/7/75 (L. B. Barrentine) Road

DECISION: Motion made and seconded, claim of the Union is denied.

UNION TO PAY FEE

RELEVANT PROVISIONS OF THE SOUTHERN AREA OVER-THE-ROAD SUPPLEMENT TO THE TEAMSTER MASTER FREIGHT AGREEMENT

ARTICLE 43.

Grievance Committees

Section 1.

The Employers and the Unions, parties to this Agreement shall together create and maintain permanent State or Multiple State Committees covering the States covered by this Agreement. The State of Multiple State Grievance Committees shall remain as now established unless changed by mutual agreement between the parties to this Agreement. It shall be the function of these Committees to adjust the disputes which cannot be settled between the Employer and the Local Union. The State or Multiple State Grievance Committees shall consist of an equal number of members appointed by Employers and Unions, but no less than three (3) from each group. Each group may appoint alternates to serve in the event of absence of permanent members. When a State or Multiple State Grievance meeting is called it shall be compulsory for each member of the Committee or the alternate to attend. Each State or Multiple State Grievance Committee shall meet within fifteen (15) days after either group Committee Chairman serves written notice on the other requesting a meeting and the place of the meeting and the exact date of same shall be mutually agreed upon. Each State or Multi-

ple State Grievance Committee shall at its first meeting formulate rules of procedure to govern the conduct of its proceedings. It is understood that any grievance of any employee working under this Agreement shall be processed by the appropriate State or Multiple State Grievance Committee.

If a dispute or grievance arising out of operations under this Agreement involves a Local Union situated in contiguous territory such dispute or grievance shall be referred to any of the State or Multiple State Grievance Committees for handling by the Chairman and Director of the Southern Conference of Teamsters, that he deems appropriate, and after such reference shall be handled under the usual procedure of that State or Multiple State Grievance Committee.

Area Committee
Section 2.

The Employers and the Unions, parties to this Agreement, shall together create a permanent Southern Conference Area Grievance Committee which shall consist of an equal number of representatives of the Employers and Unions from the Southern Conference Area. The Employers and the Unions each agree to notify the other in writing, giving the names of their respective Chairman within thirty (30) days after the signing of this Agreement. The respective Chairmen shall jointly decide the number of members comprising the Grievance Committee and shall furnish the names of their members in writing to the other. Thereafter any changes in representatives on the Southern Conference Area Grievance Committee will be by written notification to the other party's respective Chairman. The Southern Conference Area Grievance Committee shall meet within fifteen (15) days after either

group Committee Chairman has served written notice on the other, the exact date and place of meeting to be mutually agreeable. The Southern Conference Area Grievance Committee shall at its first meeting formulate rules of procedure to govern the conduct of its proceedings.

Function of Committees
Section 3.

It shall be the function of the various committees, above referred to, to settle disputes which cannot be settled between the Employer and the Local Union in accordance with the procedures established in Section 1, Article 44.

Subcommittees
Section 4.

All Committees established under this Article may act through subcommittees duly appointed by such Committees.

ARTICLE 44.
Grievance Machinery and Union Liability. Section 1

The Unions and the employers agree that there shall be no strikes, lockouts, tieups, or legal proceedings without first using all possible means of settlement as provided for in this Agreement and in the National Agreement, if applicable, of any controversy which might arise. Disputes shall first be taken up between the Employer and the Local Union involved. Failing adjustment by these parties, the following procedure shall then apply:

(a) Where a State or Multiple State Committee, by a majority vote, settles a dispute no appeal may be taken to the Southern Conference Area Grievance Commit-

tee. Such decision will be final and binding on both parties.

(b) Where a State or Multiple State Committee is unable to agree or come to a decision in the case, by majority vote, such case shall automatically be put on the Agenda of the next Southern Conference Area Grievance Committee meeting, by the Secretary of the State or Multiple State Grievance Committee, and must be decided by the Southern Conference Area Grievance Committee at the next Southern Conference Area Grievance Committee meeting. The decision of the Southern Conference Area Grievance Committee, by majority vote, shall be final and binding on both parties.

(c) Except as provided in Section 5 of this Article, deadlocked cases may be submitted to umpire handling if a majority of the Southern Conference Area Grievance Committee determines to submit such matter to an umpire for decision. Otherwise either party shall be permitted all legal or economic recourse.

(d) Failure of any Committee to meet without fault of the complaining side, refusal of either party to submit to or appear at the grievance procedure at any stage, or failure to comply with any Committee decision withdraws the benefits of this Article.

(e) The procedures set forth herein may be invoked only by the authorized Union representative or the Employer.

(f) The Employer shall be required to pay all monies due an employee as a result of a monetary grievance decision by the following second (2nd) regular pay period. Failure of the Employer to comply with this paragraph shall permit the Union to take strike action

and the Employer shall make whole all employees for all lost time as a result of said strike.

Section 2.

Notwithstanding anything herein contained, it is agreed that in the event any Employer is deliquent at the end of a period in the payment of his contribution to the Health and Welfare or Pension Fund or Funds, created under this Agreement, in accordance with the rules and regulations of the Trustees of such Funds, after the proper official of the Local Union has given seventy-two (72) hours notice to the Employer of such delinquency in Health and Welfare or Pension payments and/or failure to comply with Article 3, Section 3, of the National Agreement the employees or their representatives shall have the right to take such action as may be necessary until such delinquent payments are made, and it is further agreed that in the event such action is taken, the Employer shall be responsible to the employeers for losses resulting therefrom.

Section 3. Referral of Interpretation.

It is agreed that all matters pertaining to the interpretation of any provisions of this Agreement may be referred by either the Union Committee's Secretary or the Operator Committee's Secretary to the Southern Conference Area Grievance Committee at any time for final decision, and such Southern Conference Area Grievance Committee shall be convened on seventy-two (72) hours notice to handle matters so referred.

Section 4. Examination of Records

The Local Union, the State or Multiple State Committee or the Southern Conference Area Grievance Committee shall have the right to examine time sheets and any other records pertaining to the computation of compensation of any individuals whose pay is in dispute, or records pertaining to a specific grievance.

Section 5. National Grievance Committee

Grievances and questions of interpretation which are subject to handling under the provisions of Article 8 of the National Agreement shall be referred to the National Grievance Committee in accordance with such Article 8.

Section 6. Committee Expense

Any meeting room expense involved in such proceedings shall be shared equally between the parties to this Agreement.

ARTICLE 50.
Paid-For Time General
Section 1.

All employees covered by this Agreement shall be paid for all time spent in the service of the Employer. Rates of pay provided for by this Agreement shall be minimums. Time shall be computed from the time that the employee is ordered to report for work and registers in and until the time he is effectively released from duty. Such payment for employee's time when not driving shall be the hourly rate.

All time lost due to delays as a result of overloads or certificate violations involving federal, state or city regulations, which occur through no fault of the employee, shall be paid for by the Employer.

Section 2.
Call-In Time

Employees called to work shall be allowed sufficient time, without pay, to get to the garage or terminal, and shall draw full pay from the time ordered to report and registers in. All employees put to work shall be guaranteed a minimum of eight (8) hours pay at the current minimum

hourly rate. If not put to work, employee shall be guaranteed six (6) hour pay at the rate specified in this Agreement, and not be required to do any work not covered by this Agreement.

Section 3.
Layover

Where an employee is required to layover from his home terminal, layover pay shall commence following the fourteenth (14th) hour, he shall be guaranteed two (2) hours pay, in any event, for layover time. (Mechanical breakdown and equipment failure is not to be included in the two (2) hour guarantee, but employee will be paid for actual time delayed only in such event.) If he is held over more than two (2) hours, he shall receive layover pay for each hour held over up to eight (8) hours in the first twenty-two (22) hours of layover period, commencing after the run ends. This pay shall be in addition to the pay to which the employee is entitled if he is put to work at any time within the twenty-two (22) hours after the run ends. The same principle shall apply to each succeeding eighteen (18) hours, and layover pay shall commence after the tenth (10th) hour.

Meal Allowance

Employees shall receive a meal allowance of Four Dollars ($4.00) immediately after the seventeenth (17th) hour of the first layover period, and immediately after the tenth (10th) hour on subsequent layovers after the first period.

When on a compensable layover on Sundays and holidays there shall be a meal allowance of Four Dollars ($4.00); 5 hours thereafter, another meal allowance of

Four Dollars ($4.00); and 5 hours later a third meal allowance of Five Dollars ($5.00).

No more than 3 meals will be allowed during any 24-hour period.

An employee shall not be compelled to report to work at home terminal until he has had ten (10) hours off duty time. Whenever any Employer arbitrarily abuses the free time allowed in this section, then this shall be considered a dispute and the same shall be subject to being handled in accordance with the grievance procedure set forth in this Agreement.

Section 4.
Breakdown, Impassable Highways

On breakdown or impassable highways, employees on all runs shall be paid the minimum hourly rate for all time spent on such delays, commencing with the first (1st) hour or fraction thereof, but not to exceed more than eight (8) hours out of each twenty-four (24) hour period, except when an employee is required to remain with his equipment during such breakdown or impassable highway, he shall be paid for all such delay time at the rate specified in this agreement and such time required to be spent with the equipment shall not be included within the first eight (8) hours out of each twenty-four (24) hour period for which a driver is compensated on breakdowns or impassable highways, but must be paid for in addition. Where an employee is held longer than an eight (8) hour period, he shall in addition be furnished clean, comfortable sanitary lodging plus meals. The pay for delay time shall be in addition to monies earned for miles driven and/or work performed.

Section 5.
Deadheading

In all cases where an employee is instructed to ride or drive on Company or leased equipment he shall receive full pay as specified in this Agreement; when instructed to deadhead on other than Company or leased equipment, the employee shall likewise receive the full rate of pay as specified in this Agreement, plus the cost of transportation. A driver will not be required to deadhead from a terminal point on company equipment that does not have DOT approved seats and belts. When a driver deadheads by airplane he will be paid hours only subject to an eight (8) hour guarantee.

Section 6.
Bobtailing

Driving of tractor without trailer shall be paid on the same basis as tractor-trailer employees.

Section 7.
Protective Equipment

Terminal yardmen and hostlers shall be provided with rain gear. Any employee physically handling in substantial quantities hides, creosoted items, spun glass, lamp black, barbed wire, and acids shall be provided with rubber or leather aprons and gloves.

ARKANSAS – BEST FREIGHT SYSTEM, INC.
Little Rock, Arkansas

July 13, 1962

BULLETIN

TO: ALL ROAD DRIVERS

In the past we have issued instructions on how all delay time at Little Rock Shop would be handled. There are some of you who are not cooperating and it is necessary that we have full cooperation.

After you are dispatched by the Road dispatcher, you will punch the time clock in the Driver's room and after checking your equipment you find it necessary to have repairs made, you will notify the Shop Foreman and Road Dispatcher, punch in on the Maintenance clock and after repairs are made have your trip report signed and punch out on the Maintenance clock.

Any time claim that does not have all of this will be denied. By a copy of this letter to all parties concerned I am instructing them to follow through on this bulletin.

Very truly yours,
ARKANSAS-BEST FREIGHT
SYSTEM, INC.

/s N.A. Carter
N. A. Carter
Drivers Supervisor

NAC/vs

cc: W.G. Karsten
Harry Rink
Bob Floaks
H. F. Martin
Shop Foreman & Loadmen

c/Local 875

ARKANSAS-BEST FREIGHT SYSTEM, INC.
Little Rock, Arkansas

June 9, 1960

BULLETIN

TO: ALL LINE DRIVERS

Effective this date, all time claims for mechanical repairs will be handled in the following manner:

While checking your unit and you find some defect where it is necessary for you to have repairs made, it will be necessary for you to show your arrival and departure time by punching the clock at the shop. This is in addition to having the Shop foreman on duty sign your trip report. All time claims that have not been handled in this manner will be returned to the driver. Your cooperation will be appreciated.

Very truly yours,
ARKANSAS-BEST FREIGHT
SYSTEM, INC.

/s/ N.A. Carter
N. A. Carter
Drivers Supervisor

NAC/vs

cc: W.G. Karsten - Ft. Smith, Ark.
Local 878 - Little Rock Ark.
Ray Easton - Ft. Smith, Ark.
John H. Neal - Little Rock, Ark.
Harry Fink - Little Rock, Ark.
H. F. Martin - Little Rock, Ark.
Road Dispatcher - Little Rock, Ark.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

[Caption omitted in printing]

[Filed May 1, 1979]

ANSWERS TO INTERROGATORIES PROPOUNDED TO THE PLAINTIFF, CLEO KEENEY

INTERROGATORY NO. 8: State the gross income you received from ABF for the years 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977 and 1978.

ANSWER: 1972 - $18,000; 1973 - $19,000; 1974 -$20,000; 1975 - $20,000; 1976 - $23,000; 1977 -$24,000; 1978 - $25,000 (approximately)

INTERROGATORY NO. 11: State the number of miles you drove each year for the years 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977 and 1978, in performing your job for ABF.

ANSWER: 1972 - 85,000; 1973 - 85,000; 1974 - 85,000; 1975 - 90,000; 1976 - 100,000; 1977 -100,000; 1978 -100,000, (approximately).

INTERROGATORY NO. 12: State the number of hours you logged as being on duty, driving, by year, for the years 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977 and 1978.

ANSWER: 50 to 60 hours, per week.

INTERROGATORY NO. 13: Identify each time since 1970 that you determined that defects existed in the working parts or accessories of your truck which resulted in

you transporting the vehicle to ABF's repair garage for needed corrections.

ANSWER: See attachment.

INTERROGATORY NO. 14: For each instance identified in the preceding Interrogatory, state the amount of time needed to make the required corrections to the vehicle.

ANSWER: Unknown, as no claim has been made for this time and the answer would be immaterial to the suit.

/s/ Cleo Keeney
CLEO KEENEY, PLAINTIFF

[Certificate of Service and Jurat omitted in printing]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

[Caption omitted in printing]

[Filed May 1, 1979]

ANSWERS TO INTERROGATORIES PROPOUNDED TO THE PLAINTIFF, LLOYD BARRENTINE

INTERROGATORY NO. 8: State the gross income you received from ABF for the years 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977 and 1978.

ANSWER: 1972 - $20,700; 1973 - $17,600; 1974 -$24,000; 1975; $28,000; 1976 - $24,000; 1977 -$28,900; 1978 - $30,300, (approximately).

INTERROGATORY NO. 11; State the number of miles you drove each year for the years 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977 and 1978, in performing your job for ABF.

ANSWER: 1972 -100,000; 1973 - 90,000; 1974 - 90,000; 1975 - 110,000; 1976 - 115,000; 1977 -115,000; 1978 -115,000, (approximately).

INTERROGATORY NO. 12: State the number of hours you logged as being on duty, driving, by year, for the years 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977 and 1978.

ANSWER: 55 to 60 hours, per week.

INTERROGATORY NO. 13: Identify each time since 1970 that you determined that defects existed in the working parts or accessories of your truck which resulted in you transporting the vehicle to ABF's repair garage for needed corrections.

ANSWER: See attachment.

INTERROGATORY NO. 14: For each instance identified in the preceding Interrogatory, state the amount of time needed to make the required corrections to the vehicle.

ANSWER: Unknown, as no claim has been made for this time and the answer would be immaterial to the suit.

/s/ Lloyd Barrentine
LLOYD BARRENTINE,
PLAINTIFF

[Certificate of Service and Jurat omitted in printing]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

[Caption omitted in printing]

[Filed May 1, 1979]

ANSWERS TO INTERROGATORIES PROPOUNDED TO THE PLAINTIFF, CHARLEY DEATON

INTERROGATORY NO. 8: State the gross income you received from ABF for the years 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, and 1978.

ANSWER: 1972 - $16,000; 1973 - $18,000; 1974 -$20,000; 1975 - $22,000; 1976 - $24,000; 1977 -$26,000; 1978 - $29,000, (approximately).

INTERROGATORY NO. 11: State the number of miles you drove each year for the years 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, and 1978, in performing your job for ABF.

ANSWER: From 1972 through 1978 approximately 100,000 per year.

INTERROGATORY NO. 12: State the number of hours you logged as being on duty, driving, by year for the years 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977 and 1978.

ANSWER: 50 to 60 hours per week.

INTERROGATORY NO. 13: Identify each time since 1970 that you determined that defects existed in the working parts or accessories of your truck which resulted in you transporting the vehicle to ABF's repair garage for needed corrections.

ANSWER: Approximately three (3) times per month.

INTERROGATORY NO. 14: For each instance identified in the preceding Interrogatory, state the amount of time needed to make the required corrections to the vehicle.

ANSWER: Unknown, as no claim has been made for this time and the answer would be immaterial to the suit.

/s/ Charley W. Deaton
CHARLEY W. DEATON,
PLAINTIFF

[Certificate of Service and Jurat omitted in printing]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

[Caption omitted in printing]

[Filed May 1, 1979]

ANSWERS TO INTERROGATORIES PROPOUNDED TO THE PLAINTIFF, MAXIE BLANTON

INTERROGATORY NO. 8: State the gross income you received from ABF for the years 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977 and 1978.

ANSWER: 1972 - $17,000; 1973 - $18,000; 1974 -$19,000; 1975 - $21,000; 1976 - $23,000; 1977 - $24,000; 1978 - $28,000, (approximately).

INTERROGATORY NO. 11: State the number of miles you drove each year for the years 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977 and 1978, in performing your job for ABF.

ANSWER: 1972 - 85,000; 1973 - 85,000; 1974 - 85,000; 1975 - 90,000; 1976 - 100,000; 1977 - 100,000; 1978 -100,000, (approximately).

INTERROGATORY NO. 12: State the number of hours you logged as being on duty, driving, by year, for the years 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977 and 1978.

ANSWER: 50 to 60 hours per week.

INTERROGATORY NO. 13: Identify each time since 1970 that you determined that defects existed in the working parts or accessories of your truck which resulted in you transporting the vehicle to ABF's repair garage for needed corrections.

ANSWER: See attachment.

INTERROGATORY NO. 14: For each instance identified in the preceding Interrogatory, state the amount of time needed to make the required corrections to the vehicle.

ANSWER: Unknown, as no claim has been made for this time and the answer would be immaterial to the suit.

/s/ Maxie Blanton
MAXIE BLANTON,
PLAINTIFF

[Certificate of Serviced and Jurat omitted in printing]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

[Caption omitted in printing]

[Filed May 1, 1979]

ANSWERS TO INTERROGATORIES PROPOUNDED TO THE PLAINTIFF, H. F. MITTCHELL

INTERROGATORY NO. 8: State the gross income you received from ABF for the years 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977 and 1978.

ANSWER: 1972 - $18,000; 1973 - $19,000; 1974 -$20,000; 1975 - $23,000; 1976 - $25,000; 1977 - $28,000; 1978 - $31,000, (approximately).

INTERROGATORY NO. 11: State the number of miles you drove each year for the years 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, and 1978, in performing your job for ABF.

ANSWER: 1971 - 85,000; 1973 - 90,000; 1974 - 100,000; 1975 - 100,000; 1976 - 114,000; 1977 - 116,000; 1978 -118,000, (approximately).

INTERROGATORY NO. 12: State the number of hours you logged as being on duty, driving, by year, for the years 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977 and 1978.

ANSWER: 55 to 60 hours, per week.

INTERROGATORY NO. 13: Identify each time since 1970 that you determined that defects existed in the working parts or accessories of your truck which resulted in you transporting the vehicle to ABF's repair garage for needed corrections.

ANSWER: Approximately 3 to 4 times per month.

INTERROGATORY NO. 14: For each instance identified in the preceding Interrogatory, state the amount of time needed to make the required corrections to the vehicle.

ANSWER: Unknown, as no claim has been made for this time and the answer would be immaterial to the suit.

/s/ H.E. Mittchell
H.E. MITTCHELL,
PLAINTIFF

[Certificate of Service and Jurat omitted in printing]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

[Caption omitted in printing]

[Filed May 1, 1979]

ANSWERS TO INTERROGATORIES PROPOUNDED TO THE PLAINTIFF, J.N. SCATES

INTERROGATORY NO. 8: State the gross income you received from ABF for the years 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977 and 1978.

ANSWER: 1972 - $17,000; 1973 - $18,000; 1974 -$19,000; 1975 - $21,000; 1976 - $23,000; 1977 - $24,000; 1978 - $28,000, (approximately).

INTERROGATORY NO. 11: State the number of miles you drove each year for the years 1970, 1971, 1972, 1973,

1974, 1975, 1976, 1977 and 1978, in performing your job for ABF.

ANSWER: 1972 - 85,000; 1973 - 85,000; 1974 - 85,000; 1975 - 90,000; 1976 - 100,000; 1977 - 100,000; 1978 -100,000, (approximately)

INTERROGATORY NO. 12: State the number of hours you logged as being on duty, driving, by year, for the years 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977 and 1978.

ANSWER: 60 to 70 hours, per week.

INTERROGATORY NO. 13: Identify each time since 1970 that you determined that defects existed in the working parts or accessories of your truck which resulted in you transporting the vehicle to ABF's repair garage for needed corrections.

ANSWER: See attachment.

INTERROGATORY NO. 14: For each instance identified in the preceding Interrogatory, state the amount of time needed to make the required corrections to the vehicle.

ANSWER: Unknown, as no claim has been made for this time and the answer would be immaterial to the suit.

/s/ J.N. Scates
J.N. SCATES
PLAINTIFF

[Certificate of Service and Jurat omitted in printing]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

[Caption omitted in printing]

[Filed April 26, 1979]

PRE-TRIAL STIPULATION

Come now, Lloyd Barrentine, Clyde G. Edwards, Cleo Keeney, Maxie Blanton, Johnny Robinson, J. N. Scates, Charley Deaton, H.E. Mittchell and L. R. Young, plaintiffs, Arkansas-Best Freight Systems, Inc., Chauffeurs, Teamsters and Helpers Local Union No. 878 and A. H. Pickering, defendants, and through their respective counsel of record and pursuant to Local Rule 9 of this Court do hereby stipulate as follows:

I.

STATEMENT OF THE CASE

This is an action brought by over the road drivers employed by defendant Arkansas Best Freight, hereinafter referred to as A.B.F. Chauffeurs, Teamsters and Helpers Local Union No. 878, hereinafter referred to as Teamsters 878, is the collective bargaining representative of plaintiffs. A.B.F. and Teamsters 878 are parties to the National Master Freight and Southern Conference Area Over-the-Road Supplemental Agreement which prescribes the wages and other terms and conditions of employment of over the road drivers employed by A.B.F. A true copy of the agreement is attached as Exhibit-A to the stipulation. Plaintiffs seek to invoke the jurisdiction of the court pursuant to 29 U.S.C. §216(b), 28 U.S.C. §1337 and 29 U.S.C. §185.

Plaintiffs allege that they bring this action on behalf of themselves and other employees of A.B.F. and members of Local 878 who are similarly situated.

Plaintiffs also allege that in the course of their employment with A.B.F., they are required to report for work at A.B.F.'s Little Rock, Arkansas truck terminal. Upon arrival, plaintiffs "punch in" on a time clock, receive their dispatch papers and fill out their daily log books. After completing their paperwork, plaintiffs locate their tractor-trailer units and then make a pretrip inspection of the unit as required by Sections 392.7 and 392.8 of the Federal Motor Carrier Safety Regulations, 49 C.F.R. 392.7 and 392.8 (1977), to determine if the tractor-trailer unit is in proper working order. If the vehicle is in proper working order, plaintiffs proceed on their assigned trip. However, if there are defects in the vehicle, plaintiffs are required to report to A.B.F.'s repair garage which is located on the same premises. Upon arriving at the garage, plaintiffs are again required to punch in on a second time clock. After repairs are completed on the vehicle, plaintiffs punch out on the second time clock and proceed on their assigned trip. At all times material to this complaint, plaintiffs have been paid for the period of time they spend in the garage waiting for the vehicle to be repaired, however, they are not paid for the lapse of time between punching in on the first time clock and punching in on the second time clock while the driver is making the pretrip inspection and transporting the vehicle to the garage.

Plaintiffs allege that A.B.F.'s failure to pay them for the lapse of time spent making the pretrip inspection and transporting the vehicle to the garage violates 29 U.S.C. §216(b). Additionally, plaintiffs allege that A.B.F. is violating article 50 of the Southern Conference Area Over-

the-Road Supplemental Agreement by not paying for the above described period of time. Article 50, section 1 of the agreement provides in pertinent part:

> All employees covered by this Agreement shall be paid for all time spent in the service of the Employer. Rates of pay provided for by this Agreement shall be minimums. Time shall be computed from the time that the employee is ordered to report for work and registers in and until the time he is effectively released from duty. Such payment for employee's time when not driving shall be the hourly rate.
>
> . . . .

Articles 43 and 44 of the agreement also prescribes grievance procedures under which to test alleged violations of the contract. Pursuant to the grievance procedure, plaintiffs Barrentine and Scates filed one or more grievances with Teamsters 878 concerning the same allegations as set forth in their complaint. Each grievance was duly processed and a hearing was held on each grievance by the Southern Multi-State Grievance Committee. Each grievance was denied. Plaintiffs Deaton, Mittchell, Keeney, Blanton, Edwards, Robinson and Young did not file grievances with Teamsters 878 based on the allegations set forth in the complaint. Plaintiffs contend also that they and others similarly situated have repeatedly sought, but have been denied full and fair representation of their grievances from Local 878. Defendants A.B.F. and Teamsters 878 deny that either 29 U.S.C. §216(b) or 29 U.S.C. §185 has been violated.

II.

UNDISPUTED FACTS

The following facts have been admitted by the parties:

A. Plaintiffs are over-the-road drivers of A.B.F. and are members of Teamsters 878. The primary job duty of each plaintiff consists of driving trucks loaded with freight in interstate commerce.

B. A.B.F. is a corporation organized under the laws of the State of Arkansas with its principal place of business in Fort Smith, Arkansas and it also operates a freight terminal in Pulaski County, Arkansas. At all times material to this complaint, A.B.F. has been engaged in the business of hauling freight across state lines throughout the United States and is thus engaged in interstate commerce.

C. Teamsters Local 878 is the collective bargaining agent of plaintiffs and other A.B.F. over-the-road drivers who are domiciled in Little Rock, Arkansas and as such owed them a duty of fair representation.

D. At all times pertinent to the allegations of the complaint, defendant A.B.F. and Teamsters 878 have been parties to the National Master Freight and Southern Conference Area Over-the-Road Supplemental Agreement which governs the wages, hours, and working conditions of the over-the-road drivers of A.B.F. A true copy of this agreement is attached as Exhibit A to the stipulation and incorporated by reference herein. Exhibit A is negotiated by the Teamsters National Freight Industry Negotiating Committee representing Local Unions affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and an Employer Association representing A.B.F.

E. Attached as Exhibit B to the stipulation are a true and correct copy of Parts 390-397 of the Federal Motor Carrier Safety Regulations duly promulgated by the U.S. Department of Transportation Federal Highway Administration. 49 C.F.R.Parts 390-397 (1977).

F. Plaintiffs and other over-the-road drivers of A.B.F. are required by 49 C.F.R. §§392.7, 392.88, 393.95 and 393.96 to make a pretrip inspection of his trailor-trailer unit to determine whether certain parts and accessories are in good working order and that certain emergency equipment is in place and ready to use.

G. Plaintiffs and other over-the-road drivers employed by A.B.F. are required to punch in at the Little Rock, Arkansas terminal when they arrive. If it is necessary for plaintiffs and other drivers to report to the repair shop, they are also required to punch in on a second time clock when they arrive at the repair shop. Plaintiffs and other drivers are not paid for the interval of time between punching in on the time clock at the terminal and punching in on the time clock in the repair shop. Plaintiffs and other drivers are paid for the period of time spent in the shop waiting for their vehicle to be repaired.

H. One or more grievances were filed by plaintiffs Barrentine and Scates based on the same facts as those alleged in their complaint.

I. A hearing was held on each grievance by the Southern Multistate Grievance Committee in Biloxi, Mississippi pursuant to Article 44 of the collective bargaining agreement. Plaintiffs Barrentine and Scates did not attend any of the grievance hearings. Each grievance was denied by the committee.

J. The Southern Multistate Grievance Committee is composed of six persons – three representing the employers and three representing the union. When a grievance is heard involving defendants A.B.F. and Teamsters 878, no representative of either A.B.F. or Teamsters 878 is allowed to sit on the panel rendering the decision. A majority decision of the Southern Multistate Grievance Committee is final and binding upon the parties to the collective bargaining agreement.

K. Plaintiffs Edwards, Blanton, Deaton, Robinson, Mittchell, Young, and Keeney did not file grievances with Teamsters Local 878 based on the allegations set forth in the complaint.

III.

UNCONTESTED ALLEGED FACTS

There are no alleged facts which any party is unable to concede but does not intend to contest at the trial by evidence to the contrary.

IV.

OBJECTIONS TO ADMISSIBILITY

There are no objections, qualifications or reservations by any party to the admissibility of any facts or matters covered by this stipulation.

V.

ISSUES OF FACT AND LAW

The mixed issues of fact and law to be resolved are as follows:

A. Does 29 U.S.C. §216(b) confer jurisdiction upon the Court or confer any substantive rights?

B. Did plaintiffs comply with the requirements of 29 U.S.C. §216(b) by filing a consent in writing to become a party to this action, as required by law? If plaintiffs failed to file their written consent, does the court have jurisdiction of the claim under 29 U.S.C. §216(b)?

C. Can plaintiffs proceed as representatives of a class pursuant to Fed. R. Civ. P. 23?

D. Is the Portal-to-Portal Pay Act, 29 U.S.C. § 254, applicable to the allegations raised in the complaint?

E. Are the terms of the bargaining agreement binding upon the plaintiffs and are they estopped from proceeding under 29 U.S.C. § 185?

F. Have the defendants breached their duty of fair representation owed to the plaintiffs?

G. Would it have been futile for all plaintiffs to attempt to resolve their complaints through the grievance procedure of the collective bargaining agreement?

H. Has defendant A.B.F. breached the collective bargaining agreement by not paying drivers for the time required to inspect their vehicle and transport it to the repair garage?

VI.

RELIEF SOUGHT

Plaintiffs seek judgment against defendants for minimum wages, for liquidated damages and for costs under the provisions of the Fair Labor Standards Act, 29 U.S.C. 216(b), and reasonable attorney's fees. Additional-

ly, plaintiffs seek a judgment under 29 U.S.C. § 185 for all amounts due them including costs and reasonable attorney's fees.

Defendant Teamsters 878 and A.B.F. asks that the complaint be dismissed with prejudice in its entirety and for reasonable attorney's fees.

VII.

SCHEDULE OF EXHIBITS

A. **Plaintiffs' Exhibits** (To be provided by plaintiffs)

B. **A.B.F.'s Exhibits**

1. **National Master Freight Agreement and Southern Conference Area Over-the-Road Supplemental Agreement**
   (a) April 1, 1976 to March 31, 1979
   (b) July 1, 1973 to March 31, 1976

* * *

[Subscription omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

[Caption omitted in printing]

[Filed May 7, 1979]

JUDGMENT

This cause having come for trial before the Court on May 2, 3, and 4, 1979; all parties having rested; and the Court having delivered an opinion at the conclusion of the trial, which opinion constitutes the findings of fact and conclusions of law of the Court under Fed. R. Civ. P. 52,

It is by the Court this 4th day of May, 1979, CONSIDERED, ORDERED, ADJUDGED, and DECREED that the complaints be, and they are hereby, dismissed with prejudice.

/s/ Richard S. Arnold,
United States District Judge.

Supreme Court, U. S.
FILED
JUL 18 1980
MICHAEL RODAK, JR., CLERK

No. 79-2006

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

LLOYD BARRENTINE, CLYDE G. EDWARDS, CLEO KEENEY, MAXIE BLANTON, JOHNNY ROBINSON, CHARLEY DEATON, H.E. MITTCHELL, AND L.R. YOUNG,
Petitioners,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN, LOCAL 878, AND A.J. PICKERING, PRESIDENT,
Respondents.

RESPONSE OF ARKANSAS-BEST FREIGHT SYSTEM, INC. TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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July 18, 1980

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TABLE OF CONTENTS

	PAGE
ADDITIONAL STATUTES INVOLVED	1
SUPPLEMENTAL STATEMENT OF THE CASE	3
A. Supplemental Facts	3
B. The Proceedings Below	3
REASONS FOR NOT GRANTING THE WRIT	5
The Decision Below Is Not Inconsistent With Decisions Of This Court And Does Not Conflict With Decisions Of Other Circuits, And Will Not Interfere With The FLSA	5
CONCLUSION	17

TABLE OF AUTHORITIES

CASES: PAGE

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 39 L.Ed. 2d 247 (1974) 12, 15, 16

Armstrong v. *Reuben*, 1969, 298 N.Y.S. 2d 325, 31 A.D. 2d 913 7

Burrell v. *LaFollette Coach Lines*, 97 F. Supp. 279 (1951) 6

Grosheck v. *Babcock and Wilcox Tublar Products Div.*, 425 F. Supp. 232 (1977) 8

Heinz v. *Anchor Motor Freight, Inc.*, 424 U.S. 54, 96 S.Ct. 1048 (1976) 5

LaChapelle v. *Owens, Illinois*, 513 F. 2d 286 (1975) 7

Leone v. *Mobil Oil Co.*, 523 F. 2d 1153 (D.C. Cir. 1975) 9

Satterwhite v. *United Postal Service, Inc.*, 496 F. 2d 448 (10th Cir. 1974) cert. denied, 419 U.S. 1079 (1975) . 6, 12, 13

Tennessee Coal Iron R.R. Co. v. *Muscoda Local No. 123*, 321 U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949, rehearing denied 322 U.S. 771, 64 S.Ct. 1257, 88 L.Ed. 1596 (1944) 8, 9

Union de Tronquistos de Puerto Rico Local 901 v. *Flagship Hotel Corp.*, 554 F. 2d 8 (1st Cir. 1977) ... 12

U.S. Bulk Carriers v. *Arguelles*, 400 U.S. 351, 91 S.Ct. Reporter 409 (1971) 9, 10

STATUTES AND REGULATIONS:

Fair Labor Standards Act

29 U.S.C. § 216(b) 2, 4, 6, 7, 8

29 U.S.C. § 255 1

29 U.S.C. § 256 ..... 2, 6

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RESPONSE OF ARKANSAS-BEST FREIGHT SYSTEM, INC. TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ADDITIONAL STATUTES INVOLVED

The Fair Labor Standards Act, 29 U.S.C. §255, provides, *inter alia,* that:

> "Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid

minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act-

> (a) if the cause of action accrues on or after May 14, 1947-may be commenced within two years after cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arriving out of a willful violation may be commenced within three years after the cause of action accrued;"

The Fair Labor Standards Act, 29 U.S.C. §216(b), provides, *inter alia,* that:

> "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and then an additional equal amount as liquidated damages . . . . No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."

The Fair Labor Standards Act, 29 U.S.C. §256, provides, *inter alia,* that:

> "In determining when an action is commenced for the purposes of section 255 of this title, an action commenced on or after May 14, 1947 under the Fair Labor Standards Act of 1938, as amended, . . . shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, . . . it shall be considered to be commenced in the case of any individual claimant-

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear-on the subsequent date on which such written consent is filed in the court in which the action was commenced."

SUPPLEMENTAL STATEMENT OF THE CASE

A. Suplemental Facts.

There are some records pertaining to the grievance proceedings which were introduced in evidence at the trial. Included among such records is a copy of the grievance as filed by the petitioner, Barrentine, which reflects that the grievance was based on a violation of Article 50 of the Collective Bargaining Agreement and "Federal Wage Laws also state that this is compensable time."

Contrary to petitioners' statements at page 4 of the Petition For a Writ Of Certiorari, Arkansas-Best Freight System, Inc. has not conceded and does not concede that only the contractual claim as submitted to, or considered by, the Grievance Committee. Arkansas-Best Freight System, Inc. is not aware of any concession by Local 878 that only the contractual claim was submitted to, or considered by, the Grievance Committee.

B. The Proceedings Below.

The Complaint alleges the first cause of action is based upon violations of Fair Labor Standards Act for failure to pay the minimum wage for time worked by

the petitioners. The Complaint at count 8 states that the plaintiffs and others similarly situated had repeatedly sought full and fair representation of their grievance "as outlined above" from and by Local 878 and had been denied such. The grievances as outlined above included the allegation of the violation of the Fair Labor Standards Act.

Nowhere in the proceeding below, either at the district court level or at the circuit court level, did the plaintiffs ever assert that the grievance committee did not consider and rule on the FLSA claims.

The Answer of Arkansas-Best Freight System, Inc., Article II, objected to the standing of the plaintiffs to maintain the action because plaintiffs failed to file written consents to become parties to the action as required by 29 U.S.C.§ 216(b). The plaintiffs at no time, either before or after filing the Complaint, filed any written consents as required by 29 U.S.C. §216(b). The defendant, Arkansas-Best Freight System, Inc., renewed its objection at trial, which objection was denied. The objection was also raised in the Pre-Trial Stipulation.

The Court of Appeals was not at all troubled with respect to the handling of the four petitioners who did not file grievances. It said that, "Those holdings might well give us trouble here. . . except for the manner in which the case was handled in the District Court." It was not only the failure of the trial counsel for petitioners to object that lead the Circuit Court to affirm the treatment of the four who had filed grievances, but also because:

> "Appellate counsel have not undertaken in connection with this appeal to differentiate the count one claims of Barrentine in this case from the count one claims of the other four plaintiffs." 26(a)

REASONS FOR NOT GRANTING THE WRIT

The Decision Below Is Not Inconsistent With Decisions Of This Court And Does Not Conflict With Decisions Of Other Circuits And Will Not Interfere With The FLSA.

1. The petitioners voluntarily submitted the FLSA claim to the Grievance Committee for determination along with the contract violation claim and both issues were resolved. The four petitioners who did not file grievances expressly agreed at trial that their claims were based on the same claims as were the petitioners who had filed grievances and should be treated the same.

The decision of the 8th Circuit in no way results in forcing or compelling workers who did not intend to submit their FLSA claims to Grievance Committees but applies only where the submission has been voluntary. (P.23a)*

Even where the submission has been voluntary, the 8th Circuit as well as the trial court acknowledge the obligation and right of the judiciary to review the fairness of the grievance proceedings to insure that the result achieved falls within the guidelines of *Heinz* v. *Anchor Motor Freight Inc.*, 424 U.S. 54, 96 S. Ct. 1048 (1976). In the instant case,the trial court made specific findings of fact that there was no evidence of any improper or illegal side agreement. In fact, the trial court found the handling of the grievances of the petitioners by the Union had been specifically approved by the petitioners. (P.9)

There is a strong federal policy favoring arbitration as a means of resolving labor disputes. There is no more

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* References to "P" are to pages in the Petition For A Writ Of Certiorari.

basic labor dispute than that of wages and hours worked. Where employees have submitted a wage and hour dispute, specifically including the question of the FLSA through a Grievance Committee; and a federal court has determined the submission and determination of the grievance to have been fair and proper, the strong federal policy of final determination of labor disputes by arbitration should be supported by following the rationale of *Satterwhite* v. *United Postal Service, Inc.*, 496 F 2d 448 (10th Cir. 1974) cert. denied 419 U. S. 1079 (1975), rather than encouraging the litigious and circuitious approach advocated by petitioners which prolongs the life of the dispute and promotes industrial strife and instability. Although counsel for petitioners are harshly critical of the grievance process, that process resulted in a resolution of the dispute between the parties within a relatively short time. In contrast, petitioners commenced this judicial action in 1973; have had it dismissed once for failure to prosecute, reinstated the suit and have managed to keep a relatively simple wage dispute unresolved for seven years.

2. The FLSA claim in this case is barred and is not properly before the court as a result of the failure of any of the petitioners to comply with the requirements of the FLSA.

No petitioner signed a written consewnt as required by 29 U.S.C. § 216(b) and 29 U.S.C. § 256 and no petitioner signed the complaint.

The case of *Burrell* v. *LaFollette Coach Lines*, 97 F. Supp. 279 (1951), was an action under the Fair Labor Standards Act to recover unpaid minimum wages. The complaint named thirty-two (32) individuals as plaintiffs. However, only one (1) of the thirty-two (32) named plaintiffs signed the complaint. The thirty-one (31)

other plaintiffs did not sign the complaint and did not file separate written consents to become parties to the action. In addition to the thirty-two (32) named plaintiffs, the complaint sought relief on behalf of all other similarly situated. However, the attempt to make the action a class action was abandoned prior to trial and the matter proceeded limited to the thirty-two (32) named parties. The court held that the action was a "collective" action and that the filing of the complaint was not a sufficient commencement of the action to stop the running of the statute of limitations as the thirty-two (32) plaintiffs who did not file separate written consents. Accordingly, the single plaintiff who executed the complaint was permitted to proceed, and the complaint was dismissed as to the thiryt-one (31) named plaintiffs who failed to sign the complaint or execute and file written consents with the court.

In the case of *Armstrong* v. *Reuben,* 1969, 298 N.Y.S. 2d 325, 31 A.D. 2d 913, the court was faced with a similar situation except the plaintiffs attempted to amend and file the written consents during trial. The appellate court held that it was error to permit the plaintiffs to file their consents, *nunc pro tunc,* during trial, after the passage of more than two (2) years since the accrual of the causes of action. In *LaChapelle* v. *Ownes, Illinois, Inc.,* 513 F. 2d 286 (1975), the Fifth Circuit Court of Appeals had occasion to construe 29 U.S.C. §216(b) as it relates to the failure of a person desiring to become a party plaintiff to execute and file his written consent. At page 288, the court said:

> "Under Section 16(b) of FLSA, on the other hand, no person can become a party plaintiff and no person will be bound by or may benefit from judgment unless he has affirmatively "opted into" the class; that is, given his written, filed consent. *Sims* v.

Park Davis & Co., 334 F. Supp. 774, 780-81 (ed. Mich.) affirmed 453 F. 2d 1259 (6th Cir. 1971) cert. denied 405 U.S. 978, 92 Sup. Ct. 1196."

In *Grosheck* v. *Babcock and Wilcox Tublar Products Div.*, 425 F. Supp. 232 (1977), and action was commenced under the Fair Labor Standards Act, 29 U.S.C. §216(b). A single plaintiff filed the suit, signed the complaint and filed his written consent to the action, as required by 29 U.S.C. §216(b). More than two (2) years after the filing of the suit, 119 additional employees tried to join the action by filing their consents. The trial court refused to permit this; notwithstanding the effect of such refusal was to bar the claims of the 119 employees because of the expiration of the statute of limitations. Only the single plaintiff was permitted to proceed.

3, The time spent by the employees for which compensation is sought does not require compensation. In *Tennessee Coal, Iron R.R. Co.* v. *Muscoda Local No. 123,* 321 U.S. 590, 64 S. Ct. 698, 88 L Ed., 949, rehearing denied 322 U.S. 771, 64 S. Ct. 1257, 88 L. Ed. 1596 (1944), this Court established a three-pronged test for determining hours worked for FLSA purposes: (1) The activity must require physical exertion; (2) Exertion must be controlled by the employer; and (3) The exertion must be pursued necessarily and primarily for the benefit of the employer.

The testimony in the instant case clearly established the inspection was not controlled by the employer but was solely under the control, as to time and manner, of the petitioners. The items to be inspected were established by the Department of Transportation and not by the employer. As noted by the 8th Circuit, the exertion was for the benefit of the motoring public and the employee

at least as much for the employer. (P. 27a) Thus, under the test of *Tennessee Coal, Iron R.R. Co.* the actual time spent would not constitute hours worked under the FLSA.

In *Leone* v. *Mobil Oil Co.*, 523 F. 2d 1153 (1975) (D.C. Cir.) the United States Court of Appeals for the District of Columbia had occasion to interpret *Tennessee Coal* in a case involving the application of the FLSA to time spent by employees participating in OSHA inspections. The District of Columbia Court said at page 1163:

> "In applying the *Tennessee Coal* test that the activity be controlled by the employer and primarily for his benefit, we find that employees accompanying an OSHA inspector fail to satisfy either requirement. It is true, as plaintiffs state, that furthering industrial safety benefits the employer. This benefit, however, does not require finding that the activity is *primarily* for the employer's benefit. Many activities which may increase employee effectiveness and thus benefit the employer and are not worktime activities under FLSA . . . ."

The case of *U.S. Bulk Carriers* v. *Arguelles*, 400 U.S. 351, 91 S. Ct. Reporter 409 (1971) is distinguishable from the instant case in that the employee in *Arguelles* did not choose to submit his claim for seaman's wages, to the grievance procedure set forth in his collective bargaining agreement but instead initially filed suit in federal court. In holding that the seaman could pursue his remedy for wages in the manner chosen this Court said, at page 412:

> "It is also said that the informal, readily available grievance and arbitration procedures might defeat any overreaching and delay by the employer which § 596 was designed to reach. We do not hold that

> § 596 is the exclusive remedy of the seaman. He may, if he chooses, use the processes of grievance and arbitration. Yet, unlike Congress, we are not in a position to say that his interests usually will be best served through § 301 rather than through § 596."

Arguelles exercised his option and chose to pursue his remedy in federal court. In the instant case, the petitioners exercised their option and chose to pursue their remedy through the grievance process. Petitioners herein no more have the right to a second option by filing suit in federal court after the grievance committe's decision than would Arguelles had he been dissatisfied with the outcome in federal court and sought to commence a subsequent grievance proceeding based on the collective bargaining agreement. This concept was expressed by Mr. Justice Harlan in his concurring opinion at page 417 of *Arguelles* where he states:

> "I think it obvious that the least desirable of all solutions would be to create a necessity for suits in both forums. In this circumstance, I think conflicting congressional policies are best reconciled by construing 46 U.S.C. § 596 and § 301 of the Labor-Management Relations Act as securing to the seaman an option to choose between an arbitral and judicial forums where he states a claim under both contract and 46 U.S.C. § 596."

Further, although the petitioners scoff at the effectiveness of procedures under the grievance committee process, the dissenting opinions of Mr. Justice White, Mr. Justice Brennan, Mr. Justice Stewart and Mr. Justice Marshall in *Arguelles*, at page 419 indicate otherwise:

> "The merits of respondents nonstatutory claims depend entirely on interpretation and application of

the bargaining agreement. Specifically, the threshold questions involved are (a) whether the respondent performed overtime work with the authorization of the master; (b) whether the crew was confined to ship because of the actions of government officials and if so whether respondent can base his claim on the alleged failure of the master to show the required documents to the crew, and (c) whether the ship had arrived "in port". . .An additional question is whether respondent was "paid" on February 17 or February 22, since the penalty accrues only until the date of payment.

"Most importantly, for purposes of this case, it is clear that the question of whether respondent was entitled to the statutory penalty depends entirely on a resolution of these questions. If if develops that petitioner has paid respondent all wages due him in a timely manner, the statutory penalty claim also disappears.

"These questions are particularly within the competence of the contractually established grievance procedure of the collective-bargaining agreement. They are all questions of fact or interpretation of various provisions of the agreement. There is not the slightest indication or contention that the grievance machinery would be unable to determine these questions, or that it would be inferior to a federal court in so doing. It is clear from the face of the claims that a familiarity with the customs and practices of shipping would be distinctly helpful in assessing the validity of the claims. This familiarity is of course, one of the prime attributes of an arbitrator."

And further, at page 421 of the dissent:

"In fact, this Court and lower federal courts have endorsed the suitability of arbitration to resolve federally created rights. In *Wilko* v. *Swan,* 346 U.S.

> expressed "hope for the (arbitration's) usefulness***in controversies based on statutes ***." *Id.*, at 432, 74 S. Ct., at 185. And courts of appeals both before and after passage of § 301 have required that Fair Labor Standards Act employee's claims for liquidated damages under 29 U.S.C. § 216(b) for failure to pay overtime wages be referred to contractual grievance prodecures before being presented to the court. *Donahue* v. *Susquehanna Collieries Co.*, 138 F. 2d 3 (CA 3 1943); *Evans* v. *Hudson Coal Co.*, 165 F. 2d 970 (CA 3 1948); *Beckley* v. *Teyssier*, 332 F. 2d 495 (CA 9 1964). *Cf. Fallick* v. *Kehr*, 369 F. 2d 899 (CA 2 1966); *Old Dutch Farms, Inc.* v. *Milk Drivers and Dairy Emp. Local Union No. 584, Intern. Broth. Of Teamsters, etc.* 243 F. Supp. 246 (EDNY 1965); *United States Steel Corp.* v. *Seafarers' Intern. Union of North America, etc.*, 237 F. Supp. 529 (EDPa.1965)."

In *Union de Tronquistos de Puerto Rico Local 901* v. *Flagship Hotel Corp.*, 554 F. 2d 8 (1st Cir. 1977), the 1st Circuit Court of Appeals reviewed both the *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L.Ed. 2d 147 (1974) decision and the decision in *Satterwhite* v. *United Postal Service, Inc., supra,* in the area of the FLSA. In agreeing that the *Satterwhite* decision is correct and does not conflict with *Alexander* v. *Gardner-Denver,* that court made the same distinction the 8th Circuit has made in the instant case, i.e., the holding in *Gardner-Denver* rests in part on the "highest priority" policy against racial discrimination which is expressed in Title VII.

While it may be good "briefsmanship" to attempt to arouse the passions of this court by repeatedly quoting out of context the phrase "mere wage dispute" in reference to the petitioners' FLSA claims, it is difficult to equate the wage claims of truck drivers who in

1978 were making between $28,000.00 and $30,000.00 a year with the rights of minorities who have been subjected to hundreds of years of discrimination. This difficulty is further compounded in considering that the instant petitioners are members of and were "fairly and properly represented" by the most powerful labor union in the United States. To state that the social, economic, political and pure muscle positions of the employee petitioners and the minorities to be protected under Title VII are the same and require the same judicial protection or review is unrealistic.

It is unlikely that any union's interest in the enforcement of the rights quaranteed by Title VII was or is as intense as the union's interest in enforcement of the rights guaranteed under the FLSA. This obvious difference between the two was acknowledged and addressed by Congress in affording the protections of Title VII against unions as well as against employers. No such protections against unions were thought necessary to be afforded under the FLSA.

The expertise necessary to prepare and prove a case of racial discrimination may well be so complex that only the federal courts have the knowledge, experience and flexibility of remedy to deal with an often subtle and insidious situation. The same considerations are not true in the area of the FLSA. Here rather it is the arbitrator or the grievance committee with its specialized knowledge and experience which is more familiar with the actual working conditions; the procedures, methods and manners by which jobs are accomplished.

The approach of the 10th Circuit Court of Appeals in the *Satterwhite* case should be adopted by this Court. *Satterwhite* correctly analyses the relationship of the

conflicting statutes and the conflicting policies of the United States. See page 450:

> "The acceptance of the Court's analysis and reasoning in Gardner-Denver does not solve our problem unless we equate the wages and hours provisions of FLSA with the anti-discrimination provisions of Title VII. Strong national policy is expressed both in Title VII, 94 S. Ct. at 1019, and in FLSA, see 29 U.S.C. § 202, and *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 706-707, 65 S. Ct. 895, 89 L.Ed. 1296. These policies, each in its turn, should be balanced against the federal policy favoring arbitration of labor disputes.
>
> "In a number of respects FLSA is importantly different from Title VII. Gardner-Denver refers to the significant role of private individuals in the enforcement of Title VII rights. . . .In *Employees, etc.* v. *Department of Public Health and Welfare of Missouri,* 411 U.S. 279, 286, 93 S. Ct. 1614, 1618, 36 L.Ed. 2d 251, the Court said that, "*** private enforcement of the (FLSA) was not a paramount objective ***."The independent statutory remedies in Title VII evince an intent to accord parallel or overlapping relief apart from contractual processes. The absence of such procedures in FLSA suggests a greater reliance on contract remedies and a lesser emphasis on individual enforcement.
>
> ". . .It established the defense of good faith reliance on administrative regulations. . .and declared the congressional policy "to protect the right of collective bargaining and *** limit the jurisdiction of the court." . . . The
> 288
> point is that in certain circumstances good faith is a defense to an FLSA action. The defense, however, is not available in Title VII actions. . . . The Portal-to-Portal Act speaks to the protection of collective bargaining. Gardner-Denver says that . . ."Title VII does not speak expressly to the

relationship between federal courts and the grievance-abritration machinery of collective-bargaining agreements." The different approach to the defense of good faith and the different emphasis on collective bargaining indicates that Congress intended that wage disputes and racial disputes should not receive the same treatment."

And further at page 451:

"Wages and hours are at the heart of the collective-bargaining process. They are more akin to collective rights than to individual rights, and are more suitable to the arbitral process than Title VII rights. Gardner-Denver says, 94 S. Ct. at 1024, that "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land," and that "judicial construction has proven especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." We are concerned with rate of pay, an issue which does not require, or lend itself to, public law considerations. The added fear expressed in Gardner-Denver that harmony between a union and an individual cannot be presumed "where a claim of racial discrimination is made," 94 S. Ct. at 1024 n. 19, has no pertinence here. One of the highest objectives of any union is to get all the money possible for all of its members."

Finally, at page 451:

"The ever-present disputes over wages and hours are readily adaptable to arbitration. Resort to judicial process after arbitration prolongs the controversy and serves no good purpose when the arbitral and judicial proceedings arise out of, and must be decided on, the same factual background."

Factually, *Alexander* v. *Gardner-Denver Co.* is distinguishable and nonapplicable to the instant case because in *Alexander* v. *Gardner-Denver Co.* the sub-

mission of the discrimination charge to the grievance process was in the format of a submission of a claim for a breach of an antidiscrimination clause in the contract. No claim for a violation of Title VII was submitted to the grievance committee. In the instant case, the petitioners not only submitted their contract violation claim to the grievance machinery but also submitted separate claims for violations of the federal wage laws. See *Alexander* v. *Gardner-Denver Co.* at page 1021:

> "The actual submission of petitioner's grievance to arbitration in the present case does not alter the situation. Although presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement, mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver."

Although the petitioners state at page 15 of the brief that employees who determine to initially file suit are placed in an unenviable position of having to risk dismissal for failing to exhaust grievance procedures, there is no evidence to support that contention. There is nothing in the record to establish that the contract permits dismissal for failure to exhaust grievance procedures or that the question has ever been raised. Even though these employees have apparently violated the finality provisions of the contract they have not been fired.

CONCLUSION

Respondent, Arkansas-Best Freight System, Inc., prays the petition be denied and for its costs.

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July 18,1980

No. 79-2006

In the Supreme Court of the United States

OCTOBER TERM, 1979

LLOYD BARRENTINE, ET AL., PETITIONERS

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether an employee's submission of a contractual claim to a grievance committee precludes the employee from bringing an action under the Fair Labor Standards Act based on the same events.

TABLE OF CONTENTS

Page

Interest of the United States 1

Statement 1

Discussion 5

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 ..... 4, 6, 7, 8

Armstrong v. *Rubin*, 31 A.D. 2d 913, 298 N.Y.S. 2d 325 4

Brooklyn Savings Bank v. *O'Neil*, 324 U.S. 697 ..... 6, 9, 10

Burrell v. *LaFollette Coach Lines*, 97 F. Supp. 279 4

Dunlop v. *City Electric, Inc.*, 527 F. 2d 394 2

Gray v. *Swanney-McDonald, Inc.*, 436 F. 2d 652, cert. denied, 402 U.S. 995 ..... 3, 4

Marshall v. *N.L. Industries, Inc.*, 78-2289 (Apr. 7, 1980) 5

Mitchell v. *DeMario Jewelry*, 361 U.S. 288 9

Mitchell v. *Mitchell Truck Line, Inc.*, 286 F. 2d 721 2

Mitchell v. *Stewart Brothers Construction Co.*, 184 F. Supp. 886 2

Page

Cases—Continued:

Morelock v. *NCR Corp.*, 586 F. 2d 1096 3

Overnight Motor Co. v. *Missell*, 316 U.S. 572 ... 9

Satterwhite v. *United Parcel Service, Inc.*, 496 F. 2d 448, cert. denied, 419 U.S. 1079 9

Tennessee Coal, Iron & R.R. Co. v. *Muscoda Local No. 123*, 321 U.S. 590 ..... 6, 8-9, 10

Union de Tronquistas de Puerto Rico, Local 901 v. *Flagship Hotel Corporation*, 554 F. 2d 8 9-10

United Steelworkers of America v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 7

Statutes:

Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* 1

29 U.S.C. 216 ..... 6, 7

29 U.S.C. 216(b) 1, 3, 6

29 U.S.C. 216(c) 1

29 U.S.C. 217 ..... 1, 6

29 U.S.C. 218 7

29 U.S.C. 256 3

Miscellaneous:

H.R. Rep. No. 327, 80th Cong., 1st Sess. (1947) 4

INTEREST OF THE UNITED STATES

The Secretary of Labor is authorized to enforce the provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201 *et seq.*, by means of suits for injunctive relief and damages. 29 U.S.C. 216(c), 217. As an alternative to enforcement by the Secretary, Congress provided for private actions to be brought by "affected" employees in any federal or state court of competent jurisdiction. 29 U.S.C. 216(b). Private FLSA plaintiffs may recover back wages, liquidated damages, costs and reasonable attorney's fees. *Ibid.* Because the Secretary cannot oversee the pay practices of every employer, he depends in substantial measure on the enforcement efforts of private parties. Any restriction on the ability of private parties fully to pursue their statutory rights thus has a significant negative impact on the enforcement of the Act.

The court of appeals' decision in this case weakens the private enforcement provisions of the Act by barring private FLSA actions by employees who have submitted a collective bargaining agreement claim based on the same facts to a grievance committee. As happened in the present case, such a refusal to entertain an FLSA claim may result in the retention of a pay practice that is an apparent violation of the Act. The United States therefore has a substantial interest in the question presented by the petition.

STATEMENT

1. Respondent Arkansas-Best Freight Systems (ABF) does not pay its drivers for the time they spend checking their vehicles for violations of Department of Transportation safety regulations and driving them to a repair

facility in those instances in which violations are found.[1] Since both lower courts found that those actions are taken in the interest of ABF (Pet. App. 4a, 21a), the time spent on them is apparently compensable under the FLSA. See *Dunlop* v. *City Electric, Inc.*, 527 F. 2d 394, 398-399 (5th Cir. 1976); *Mitchell* v. *Mitchell Truck Line, Inc.*, 286 F. 2d 721, 725 (5th Cir. 1961); *Mitchell* v. *Stewart Brothers Construction Co.*, 184 F. Supp. 886, 895 (D. Neb. 1960).

This time is also apparently compensable under the collective bargaining agreement that was in force between ABF and respondent Local 878 of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen. Article 50 of that agreement required ABF to pay its employees "for all time worked by them in the service of the employer" (Pet. App. 17a). Accordingly, petitioner Barrentine and another ABF driver, J.N. Scates,[2] filed grievances claiming a right to back wages

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[1]Upon arriving at the terminal to begin a trip, an ABF driver "punches in" on a time clock, picks up a manifest for the trip and performs certain preliminary office functions, for which he is paid at non-driving time rates. After he completes the preliminary work, he "punches out," locates his vehicle and makes the required pre-trip safety inspection of it. If he finds no defects, he proceeds on his trip, in which case he is paid at the driving time rate for all time spent driving. If, however, the driver discovers a defect, he is required to take the vehicle to a repair facility, which is owned by ABF and located on its premises, where the driver "punches in" on a second clock. In that case, the driver is not paid for the time between his "punch-out" and his second "punch-in;" his paid time recommences with the time spent on repairs (Pet. App. 18a).

[2]Although Scates was initially a plaintiff in this action, he recently was elected an officer of Local 878 and has filed a motion with the district court for leave to withdraw. He is not, therefore, a petitioner in this action.

under the terms of the collective bargaining agreement (*e.g.*, R. 51-52, 81).[3] The joint labor-management committee that heard the grievances denied recovery under the contract.

2. The two grievants and six other ABF drivers[4] thereupon filed the complaint in this case, alleging a violation of the Fair Labor Standards Act by ABF and a breach of the duty of fair representation by the Union and its president, respondent A.J. Pickering.[5] The district

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[3]"R." references are to the record in the district court.

[4]Petitioner Barrentine and Scates were joined in this action by petitioners Edwards, Keeney, Blanton, Robinson, Deaton, Mitchell and Young. Prior to trial, the complaint was dismissed with prejudice as to petitioners Robinson, Young and Edwards on the ground of their failure to answer interrogatories.

Although only petitioner Barrentine and Scates had filed grievances, the district court rejected the defense claim that the other employees could not proceed in the case since they had not exhausted their contractual remedies. The district judge explained that it would have been a futile gesture for the remaining employees to have filed grievances and gone to arbitration in light of their knowledge of the action that the grievance committee had taken in the cases of Barrentine and Scates. Accordingly, he "treat[ed] the case as though each of the named plaintiffs had actually filed grievances which were considered and denied" (Pet. App. 6a). In neither of the courts below did petitioners object to that approach (Pet. App. 26a).

[5]Respondent ABF asserts (Br. 6-8) that petitioners did not file written consents authorizing suit, as required by 29 U.S.C. 216(b), and that therefore their FLSA claims are barred. The filing of consents is not a jurisdictional requirement, but serves only to stop the running of the statute of limitations in "collective or class actions" (29 U.S.C. 256). The complaint in this case initially sought relief on behalf of named plaintiffs and others similarly situated, but the claims on behalf of the similarly situated employees were dismissed prior to trial (Pet. App. 15a n.1). Two courts of appeals have held that where, as in this case, a case is tried as one brought on behalf of named individuals, consents are unnecessary. *Morelock* v. *NCR Corp.*, 586 F. 2d 1096, 1103 (6th Cir. 1978); *Gray* v. *Swanney-McDonald, Inc.*, 436 F. 2d 652, 655 (9th Cir.), cert. denied, 402 U.S. 995 (1971); see H.R. Rep. No. 327, 80th Cong., 1st Sess. 13 (1947). But see *Burrell* v. *La Follette Coach Lines*, 97 F. Supp. 279 (E.D.

court found (Pet. App. 4a) that the collective bargaining agreement, read literally, would require compensation for the time in question since the employees' actions were taken in the interest of the employer. Nevertheless, the court held against the employees on the fair representation claim, finding (Pet. App. 8a-9a) that although there probably was a "side deal" between the union and ABF, it was not improper because the parties could by agreement "fill in the gaps" in the collective bargaining agreement, and holding (Pet. App. 9a) that even if there were an improper side deal, it had no effect on the grievance decisions. The district court dismissed the entire action without discussing the FLSA claim.

3. On appeal, the court of appeals agreed that the employees' actions were taken in the interest of the employer (Pet. App. 21a), but affirmed the district court's findings on the fair representation issue (Pet. App. 28a-30a).[6] It also affirmed the dismissal of petitioners' FLSA claims on the ground that they were barred by the prior grievance proceedings. The court distinguished *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), on the ground that the matter taken to arbitration in that case involved race discrimination and "the right of an employee to be free from such discrimination may well be thought to

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Tenn. 1951); *Armstrong* v. *Rubin*, 31 A.D.2d 913, 298 N.Y.S.2d 325 (1969). Even if petitioners were required to file consents, the signatures on the answers to interrogatories of those petitioners whose cases proceeded to trial satisfied the requirement. *Gray* v. *Swanney-McDonald, Inc.*, *supra*, 436 F. 2d at 655. At most, the consent issue would affect the period for which petitioners could recover back wages, since petitioners have alleged a continuing violation of the Act (R.1).

[6]Petitioners are not seeking this Court's review of the court of appeals' rejection of their fair representation claim.

stand in more need of protection than conventional arbitration of a simple wage dispute may provide" (Pet. App. 25a).

Judge Heaney dissented, stating (Pet. App. 30a-31a):

> the Supreme Court's conclusions in *Alexander* v. *Gardner-Denver Co.* * * * apply with equal force to claims arising under FLSA; an employee's FLSA claim is not precluded by prior submission of his claim to arbitration under a collective bargaining agreement, unless the parties clearly and specifically consented to have the FLSA claim decided by the arbiters[,]

and noting (Pet. App. 31a) that:

> [i]n this case, there was no intent to submit the FLSA claim to arbitration and it was not submitted to arbitration.

DISCUSSION

Because of the importance of the question presented in this case[7] to the enforcement of the Fair Labor Standards Act, and because the decision of the court of appeals represents a growing line of authority that conflicts with

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[7]Contrary to petitioners' suggestion (Pet. 12-13), this case does not present the question whether an employee who filed no grievance could be barred from instituting an FLSA action, since the non-grievant petitioners have never objected to the district court's treatment of their cases as identical to those of petitioner Barrentine and Scates, who did file grievances (see note 4, *supra*).

Nor does this case raise the question whether the Secretary has a right to institute an FLSA action based on the same facts that gave rise to an employee's submission to a grievance committee of a contractual claim (contrary to petitioners' suggestion at Pet. 14-15). In any event, that question must be answered in the affirmative. See *Marshall* v. *N.L. Industries, Inc.*, No. 78-2289 (7th Cir. Apr. 7, 1980).

this Court's decisions in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), *Tennessee Coal, Iron & R.R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590 (1944), and *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945), the United States submits that the decision below warrants review by this Court.

1. In *Alexander* v. *Gardner-Denver Co., supra*, this Court held that an employee's submission of a grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement did not preclude his statutory right to a trial de novo under Title VII. In so holding, the Court emphasized the following features of Title VII: that an employee's rights under that statute may not be waived (415 U.S. at 51-52); that final responsibility for enforcing the statute is vested in the courts (*id.* at 44-45); that the private right of action is an essential means of obtaining judicial enforcement of Title VII (*id.* at 45); that there is no suggestion in the statute that a prior arbitral decision forecloses an individual's right to sue (*id.* at 47); and that Title VII provides for consideration of employment discrimination claims in several forums and permits individuals to pursue independently rights under both Title VII and other applicable state and federal statutes (*id.* at 47-48).

The critical features of Title VII that this Court relied on to hold that an employee does not forfeit his private cause of action thereunder if he first pursues his grievance to final arbitration also inhere in the FLSA. It, like Title VII, is a remedial statute guaranteeing to employees nonwaivable rights (*Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945)). The ultimate authority for enforcing the Act is vested in the courts (29 U.S.C. 216, 217), and the private right of action is an essential means of obtaining that enforcement (29 U.S.C. 216(b)). The FLSA provides for the consideration of wage claims in both state and

federal forums (29 U.S.C. 216) and expressly preserves other federal and state laws establishing minimum wages or maximum hours (29 U.S.C. 218). Nor is there any suggestion in the Act that a prior arbitral decision forecloses an individual's right to sue or divests federal courts of jurisdiction.

Most importantly, under the FLSA, as under Title VII (see *Alexander* v. *Gardner-Denver, supra*, 415 U.S. at 49-51), an employee is asserting a statutory right independent of and distinct from any right that he may have under a contractual bargaining agreement and that he may submit to arbitration. As this Court stated in *Gardner-Denver, id.* at 53, it is not the function of an arbitrator to protect rights guaranteed by statute; his task is limited to construing the collective bargaining agreement so as to effectuate the intent of the parties thereto. Indeed, "[i]f an arbitral decision is based 'solely upon the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced." *Ibid.*, quoting *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

An arbitrator thus is not concerned with the legality *under the FLSA* of a challenged pay practice, but only with its consistency with the provisions of the applicable collective bargaining agreement. Yet, under the decision of the court of appeals, the ruling of a grievance committee *that did not even purport to resolve the FLSA claim and to which the FLSA claim was not even submitted* precludes the employee from exercising his statutory right of judicial consideration of his FLSA

claim.[8] The result is that, as happened in the present case, an apparent violation of the FLSA will remain uncorrected and the merits of the FLSA claim will never be considered.

The alternative left to the employee by the Eighth Circuit is to eschew the grievance procedure in favor of bringing suit based on his FLSA claim. That result, however, encourages litigation at the expense of "the federal policy favoring arbitration of labor disputes." 415 U.S. at 59. Moreover, such a result conflicts with this Court's statement in *Gardner-Denver* (*id.* at 52) that "a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination."

The court of appeals distinguished *Alexander* v. *Gardner-Denver* on the ground that an employee's claim of racial discrimination needs greater protection than does a "simple wage claim" (Pet. App. 24a-25a).[9] But the FLSA, like Title VII, is "remedial and humanitarian in purpose." *Tennessee Coal, Iron & R.R. Co.* v. *Muscoda*

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[8]Respondent ABF asserts (Br. 3-4, 5, 16) that petitioners did, in fact, submit their FLSA claims to the grievance committee. However, neither the grievances submitted to the committee nor the committee reports thereon (R. 43-54, 77-81) even mention the FLSA claim. The statement in petitioner Barrentine's "member grievance report" (R. 52) that "Federal Wage Laws also state that this is compensable time" is the only mention of federal law in the record of the grievance proceeding. No statute or judicial decision is cited. This cannot reasonably be construed as submitting an FLSA claim to the grievance committee. In sum, as Judge Heaney stated in his dissent (Pet. App. 31a), "there was no intent to submit the FLSA claim to arbitration and it was not submitted to arbitration." There is nothing to the contrary in either the district court's or the court of appeals' opinion.

[9]This Court's holding in *Gardner-Denver* presumably extends to all Title VII claims, regardless of whether the alleged discrimination is based on race, color, religion, sex or national origin.

Local No. 123, 321 U.S. 590, 597 (1944). It was enacted to eliminate those "labor conditions detrimental to a minimum standard of living required for the general well-being of workers" by paying a minimum wage and a premium rate for overtime work so that employees would receive " '[a] fair day's pay for a fair day's work' " and be protected from "the evil of 'overwork' as well as 'underpay'." *Overnight Motor Co.* v. *Missel,* 316 U.S. 572, 576, 578 (1942). See also *Mitchell* v. *DeMario Jewelry,* 361 U.S. 288, 292 (1960); *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 706-707 (1945). Accordingly, its provisions, like those of Title VII, should be construed to accomplish the Act's important purposes.

The court below followed the Tenth Circuit's holding in *Satterwhite* v. *United Parcel Service, Inc.,* 496 F. 2d 448, 452, cert. denied, 419 U.S. 1079 (1974), that "when a wage dispute is submitted to arbitration in accordance with a collective-bargaining agreement, the employees may not thereafter maintain an FLSA §16(b) suit for recovery on the basis of the same factual occurrence as that presented to the arbitrator."[10] The First Circuit has also relied on *Satterwhite,* holding that an unfavorable arbitral decision precluded a subsequent action based on an administrative regulation of the Minimum Wage Board of Puerto Rico. *Union de Tronquistas de Puerto Rico, Local 901* v. *Flag-*

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[10] *Satterwhite,* in which the government did not participate, involved allegations that the employer's refusal to pay for time included in a lunch break, which previously had been designated as paid coffee breaks, violated the overtime provisions of the FLSA. The employer opposed the employees' petition for a writ of certiorari on the ground, *inter alia,* that the employees unquestionably had not worked more than 40 hours per week. In contrast, in the present case it is undisputed that petitioners put in time inspecting their vehicles and driving them to ABF's repair facility, for which they were not compensated; and both courts below found that those actions were taken in the interest of ABF.

ship Hotel Corporation, 554 F. 2d 8 (1977).[11] The decision below thus is not an isolated aberration from this Court's decision in *Gardner-Denver,* but, rather, represents a growing line of authority that conflicts with that decision and, if permitted to stand, will present serious problems for the effective enforcement of the FLSA.

2. The foregoing decisions also conflict with this Court's decisions in *Tennessee Coal, Iron & R.R. Co.* v. *Muscoda Local No. 123,* 321 U.S. 590 (1944), and *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697 (1945). In *Tennessee Coal,* the Court made clear (321 U.S. at 602-603) that a collective bargaining agreement's condonation of an employer's practice of compensating an employee for less than all of his time does not preclude that practice from constituting a violation of the FLSA. Similarly, in *Brooklyn Savings Bank,* the Court held that waivers of wage rights guaranteed by the FLSA are illegal and without effect because they would nullify the FLSA's purpose to protect employees from "sub-standard wages and excessive hours which endangered the national health and well-being * * *" (324 U.S. at 706).

As discussed above, however, the decision of the court of appeals results in an employee's FLSA claim being foreclosed by a ruling of an arbitrator or grievance committee applying only the terms of the collective bargaining agreement. Thus, under the decision below, a pay practice violative of the FLSA would be immune from suit by the affected employees to enforce their statutory rights so long as the arbitrator or grievance committee found it to be in conformity with the

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[11] In *Union de Tronquistas,* unlike the present case (see note 8, *supra*), the employees' claim under the administrative regulation was submitted to the arbitrator (554 F. 2d at 9-10) and expressly decided by him (*id.* at 10).

applicable bargaining agreement. Such a result is in direct contravention of this Court's mandate that the terms of a collective bargaining agreement cannot shield an employer from liability under the FLSA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1980

No. 79-2006

IN THE

Supreme Court of the United States

October Term, 1979

LLOYD BARRENTINE, CLYDE G. EDWARDS, CLEO KEENEY, MAXIE BLANTON, JOHNNY ROBINSON, CHARLEY DEATON, H.E. MITTCHELL, AND L.R. YOUNG,

Petitioners,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN, LOCAL 878, AND A.J. PICKERING, PRESIDENT,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Does an employee's submission of his contractual claim for wages for hours worked to a grievance committee, as required by his collective bargaining agreement, foreclose a federal court from reviewing a subsequent claim under the minimum wage provisions of the Fair Labor Standards Act ("FLSA") where the FLSA claim was not in fact submitted to or passed upon by the grievance committee?

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... (i)

OPINIONS BELOW 1

JURISDICTION 1

STATUTE AND CONTRACTUAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. **Facts** 3

B. **The Proceedings Below** 5

SUMMARY OF ARGUMENT 8

ARGUMENT 11

A. **The Decision Below Conflicts With the Statutory Scheme of the FLSA** 11

B. **This Court's Decision In *Gardner-Denver* Establishes That Deferral Is Not Appropriate Where, As Here, The Rights At Stake Are Conferred By Statute, And Congress Has Vested Enforcement Responsibility In The Courts** 15

C. **Non-Deferral in FLSA Cases Will In No Way Undermine The National Policy Favoring Arbitration** 24

CONCLUSION 29

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES

Cases: **Page**

Air Line Pilots Ass'n v. Northwest Airlines, Inc., 627 F.2d 272 (D.C. Cir. 1980) 27

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) ..... *passim*

Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956) 21

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945) 8, 11, 12, 15, 16, 17, 22

Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964) 27

Dunlop v. City Electric, Inc., 527 F.2d 394 (5th Cir. 1976) 13

General Drivers, Warehousemen & Helpers Local No. 89 v. Riss, 372 U.S. 517 (1963) 24

Iowa Beef Packers v. Thompson, 185 N.W. 2d 738 (Iowa 1971), *cert. dismissed as improvidently granted*, 405 U.S. 228 (1972) ... 27

Leone v. Mobil Oil Co., 523 F.2d 1153 (D.C. Cir. 1975) 20

Marshall v. N. L. Industries, Inc., 618 F.2d 1220 (7th Cir. 1980) 27

McKinney v. Missouri-Kansas-Texas R.R., 357 U.S. 265 (1958) 26

Mitchell v. Mitchell Truck Line, Inc., 286 F.2d 721 (5th Cir. 1961) 13

Mohasco Corp. v. Silver, 100 S.Ct. 2486 (1980) 19

Overnight Motor Transport Co. v. Missel,
316 U.S. 572 (1943) 16

Republic Steel Corp. v. Maddox,
379 U.S. 650 (1965) 25, 26

Satterwhite v. United Postal Service,
496 F.2d 448 (10th Cir. 1974), *cert. denied*, 419 U.S. 1079 (1975) 20, 23

Schulte v. Gangi,
328 U.S. 108 (1946) 11, 12, 15, 17, 22

Steiner v. Mitchell,
350 U.S. 247 (1956) 13

Tennessee Coal, Iron R. R. v. Muscoda Local No. 123, 321 U.S. 590 (1944) 8, 11, 12, 14, 15, 16, 22

Union de Tronquistas de Puerto Rico, Local 901 v. Flagship Hotel Corp., 554 F.2d 8
(1st Cir. 1977) 28

United States v. Barnette,
546 F.2d 187 (5th Cir. 1977) 22

U.S. Bulk Carriers v. Arguelles,
400 U.S. 351 (1971) 21, 23, 25, 26

United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960) 24

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 22, 24, 25

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 24

Vaca v. Sipes,
386 U.S. 171 (1967) 15

Wilko v. Swan,
346 U.S. 427 (1953) 21

Statutes and Regulations:

National Labor Relations Act
29 U.S.C. § 173(d) 24

Fair Labor Standards Act
29 U.S.C. § 201 *et seq.* 5
29 U.S.C. § 202(a) 11, 16
29 U.S.C. § 206 ..... 5, 11, 17
29 U.S.C. § 206(b) 2
29 U.S.C. § 207 ..... 11, 17
29 U.S.C. § 207(b)(1) & (2) 13
29 U.S.C. § 216(b) 5, 11, 14, 17, 18
29 U.S.C. § 216(c) 11
29 U.S.C. § 218 19

Portal-to-Portal Act:
61 Stat. 87 14

Interstate Commerce Act:
49 U.S.C. § 304 3

Universal Military Training and Service Act:
50 U.S.C. App. § 459 26

Federal Motor Carrier Safety Regulations:
49 C.F.R. § 390 *et seq.* 3

Legislative History:

Fair Labor Standards Act:
Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess. (1937) 13, 14

S. Rep. No. 48, 80th Cong., 1st Sess. (1947) 14

H. R. Rep. No. 2738, 75th Cong., 3d Sess. (1938) 17

H. R. Rep. No. 1452, 75th Cong., 1st Sess. (1937) 14

81 Cong. Rec. (1937) 16

83 Cong. Rec. (1938) 17, 18, 19

Miscellaneous:

Azoff, *Joint Committee as an Alternative Form of Arbitration Under the NLRA*, 47 Tul.L.Rev. 325 (1973) 4, 24

Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal.L.Rev. 663 (1973) 4

Note, *The NLRB and Deference to Arbitration*, 77 Yale L.J. 1191 (1968) 23

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-2006

LLOYD BARRENTINE, *et al.*,

Petitioners,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the district court (Pet. App. 1a-13a) is not officially reported. The opinion of the court of appeals (Pet. App. 14a-31a) is reported at 615 F.2d 1194.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1980. Mr. Justice Blackmun entered an order on May 9, 1980 extending the time to file a petition for a writ of certiorari until June 19, 1980. The petition for a writ of certiorari was filed on June 19, 1980, and was granted on October 6, 1980. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTE AND CONTRACTUAL PROVISIONS INVOLVED

Section 6(b) of the Fair Labor Standards Act, 29 U.S.C. § 206(b), provides, *inter alia,* that:

> Every employer shall pay to each of his employees . . . who in any workweek is engaged in commerce or in the production of goods for commerce . . . wages . . . not less than the minimum rate in effect under subsection (a)(1) of this section.

Section 5 of Article 44 of the Southern Conference Area Over-the-Road Supplement to the Teamster National Master Freight Agreement provides, *inter alia,* that:

> It shall be the function of . . . [grievance] committees . . . to settle disputes which cannot be settled between the Employer and the Local Union.

Section 1 of Article 45 of the Southern Conference Area Over-the-Road Supplement to the Teamster National Master Freight Agreement provides, *inter alia,* that:

> The Union and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of settlement as provided for in this Agreement, and in the National Agreement, if applicable, of any controversy which might arise . . . .

STATEMENT OF THE CASE

A. Facts

All interstate commercial motor carriers and drivers are subject to the Federal Motor Carrier Safety Regulations, 49 C.F.R. § 390 *et seq.*, promulgated by the U.S. Department of Transportation under the authority of the Interstate Commerce Act. 49 U.S.C. § 304. The regulations require, among other things, that before embarking on an over-the-road trip, a driver must perform a safety inspection of his vehicle and refrain from driving it if mechanical defects are discovered. 49 C.F.R. §§ 392.7, 396.4 (1979).

Despite the critical importance of these inspections, respondent Arkansas-Best Freight System ("ABF") has long maintained that it is not required to compensate drivers based at its Little Rock, Arkansas terminal for the time they spend conducting the inspection and, when necessary, taking the vehicle to the company's repair facility.

The driver's daily routine may be summarized briefly. Upon arriving at the terminal to begin a trip, an ABF driver "punches in" on a time clock, picks up the trip manifest, and completes certain preliminary office functions. He is paid at an hourly rate for these activities. After finishing the necessary paperwork, the driver "punches out," locates his vehicle and performs his pre-trip safety inspection. If the driver finds no defects, he proceeds on his trip, and is paid mileage rates for the time spent on the road. However, if mechanical defects are discovered, the driver is required to take the vehicle to ABF's repair facility. In either case, the driver receives no pay for the time spent inspecting the vehicle. Where repairs are necessary, the driver "punches in" on a time

clock at the repair facility and is paid an hourly rate for the time spent awaiting the completion of the repairs (Pet. App. 2a-3a, 18a; App. 44, 47). Generally, it takes from fifteen minutes to a half an hour to inspect the vehicle, and, if defects are discovered, drive it to the repair facility. *See* Attachments to Plaintiffs' Answers to ABF Interrogatory 13. ABF refuses to compensate petitioners for this time.

To challenge this pay practice, two drivers, petitioner Lloyd Barrentine and Jimmy Scates, filed several grievances with their union, Local 878 of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen ("Local 878"), alleging that ABF's failure to pay for this time violated Article 50 of their collective bargaining agreement, which requires that drivers be compensated for "all time spent in the service of the Employer." (App. 27) The union in turn filed formal grievances under Article 44 of the collective bargaining agreement, which provides that "any controversy which might arise" between the union and management must be submitted to a joint grievance committee whose decision "shall be final and binding on both parties." (App. 24-25) Unlike conventional arbitration, however, the joint grievance committees contain no neutral tie-breakers or impartial members; they are composed of an equal number of union and management representatives. *See generally* Azoff, *Joint Committees as an Alternative Form of Arbitration Under the NLRA,* 47 Tul.L.Rev. 325 (1973); Feller, *A General Theory of the Collective Bargaining Agreement,* 61 Cal.L.Rev. 663, 836-838 (1973).

The grievances were presented to a joint grievance committee by Local 878. Although, as the lower courts subsequently found, the unpaid time falls within the literal language of their contract, the grievance committee re-

jected the claims. No written decisions were issued; no transcripts were made; the votes were not recorded; and, as both ABF and Local 878 conceded before the court of appeals (Pet. App. 31a), there is no indication that any claim under the FLSA was presented to, much less considered by, the grievance committee.

B. The Proceedings Below

In March 1977, the two unsuccessful grievants, joined by seven other ABF drivers, brought an action in the United States District Court for the Eastern District of Arkansas to obtain pay for the time spent conducting pre-trip safety inspections and taking unsafe vehicles to the company's repair facility (App. 3).[1] Both ABF and Local 878 were named as defendants, as was the Local's president, A.J. Pickering. The first count of the complaint was brought under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), which requires that all covered workers be paid at least the minimum wage for all "hours worked." *Id.* §§ 206, 216(b). Petitioners contended that ABF's refusal to compensate them for this time violated the minimum wage provision of the FLSA, and hence they were entitled to double damages and attorney's fees, as mandated by the Act. *Id.* § 216(b).

The second count of the complaint was based on the union's contract with ABF, which requires compensation for "all time spent in the service of the Employer." To

[1]Barrentine and Scates were joined by Local 878 members Edwards, Keeney, Blanton, Robinson, Deaton, Mittchell and Young. Prior to trial, the court dismissed the complaint as to Robinson, Young and Edwards because of their failure to answer interrogatories. Although Mr. Scates was initially a plaintiff in this action, he recently was elected an officer of Local 878 and has filed a motion with the district court for leave to withdraw. Accordingly, Mr. Scates did not join the petition for certiorari filed in this action.

overcome the hurdle of the prior grievance committee decisions, petitioners asserted that Local 878 had breached its duty of fair representation by entering into a "side deal" with ABF to avoid payment. Therefore, petitioners alleged, the grievance awards barring compensation should be set aside and they should be awarded proper compensation under the contract (App. 6-8).

Following a bench trial, the district court issued an oral ruling (Pet. App. 1a). The court first found that "[t]here is no question that the driver when [inspecting the vehicle and driving it to the repair facility] is on the employer's business; at least no question in my mind." (Pet. App. 4a). The court was also persuaded that ABF paid its drivers at other terminals for performing safety checks, and that other companies who are parties to the collective bargaining agreement did the same (Pet. App. 3a-4a). The court further concluded that "the evidence seems. . . rather to predominate in favor of finding that there was a side agreement." (Pet. App. 8a). Nonetheless, the court refused to award petitioners judgment on their contract claim, finding that such an agreement was not necessarily improper since the labor laws permit "parties by their own actions. . . [to] fill in gaps that always arise" in the enforcement of collective bargaining agreements (Pet. App. 8a). Based on this finding, the district court dismissed the action with prejudice. The district court did not address petitioners' FLSA claim.

On appeal, the Eighth Circuit unanimously affirmed the district court's ruling on the contract claim, concluding that the grievance committee's decisions were not "tainted" by a side deal, if one existed (Pet. App. 30a). That ruling is not challenged in this Court.

Turning to petitioners' FLSA claim, a divided court held that "wage disputes arising under the FLSA . . . may be the subject of binding arbitration where the collective bargain-

ing agreement so provides . . . at least in situations where the employees knowingly and voluntarily submit their grievances to arbitration under the terms of that agreement." (Pet. App. 23a). In so ruling, Judge Henley, writing for himself and District Judge Schatz, rejected petitioners' contention that the rationale of this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), applies with equal force to claims arising under the FLSA (Pet. App. 24a). The majority purported to distinguish *Gardner-Denver* on the ground that "simple wage dispute[s]" do not implicate the same public policy considerations that are present in Title VII cases (Pet. App. 25a). While troubled by the fact that five of the petitioners had not filed grievances, the majority held that they too were precluded from pursuing an FLSA remedy because no objection had been lodged against the district court's "treating the case as though each of the named plaintiffs had actually filed grievances which were considered and denied." (Pet. App. 26a). In so holding, however, the court overlooked the fact that the five had acceded to this procedure only in order to make it unnecessary for the district court to reach ABF's contention that their claims should be dismissed for failing to exhaust their grievance remedies.

Judge Heaney dissented from the court's FLSA ruling, finding the majority opinion in conflict with *Gardner-Denver*. Judge Heaney concluded that since "there was no intent to submit the FLSA claim to arbitration and it was not submitted to arbitration," the case should be remanded "for a determination of the validity of plaintiffs' FLSA claim." (Pet. App. 30a-31a).

SUMMARY OF ARGUMENT

The decision below, if allowed to stand, will substantially erode the guarantees of the Fair Labor Standards Act. According to the Eighth Circuit, workers who submit contract-based wage claims to arbitration, either voluntarily or because of compulsory grievance procedures in their contract, are barred from seeking judicial enforcement of their independent, statutory right to be paid at least the minimum wage for all hours worked. Court review is foreclosed for even those workers, like petitioners, who never submitted their FLSA claims to a grievance committee, nor had the committee pass on the merits of those claims. Because the decision of the court below is inconsistent with the FLSA and conflicts with this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), it should be reversed.

A.

The Fair Labor Standards Act was enacted by Congress in 1938 to ensure that workers were protected from substandard wages and oppressive working hours. To this end, the Act sets out a strict policy of guaranteed compensation for workers covered by the Act, and confers a right to be paid at least the minimum wage for all hours worked. The responsibility for enforcing FLSA rights was assigned to the courts; no other enforcement mechanism is provided by the Act.

The decision below is at odds with the prior decisions of this Court holding that rights conferred by the FLSA cannot be abridged by contract or otherwise prospectively waived. *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 706-708 (1945); *Tennessee Coal, Iron R.R. v. Muscoda Local No. 123,* 321 U.S. 590, 597, 601-603 (1944). Con-

trary to this settled principle, the decision of the lower court effectively insulates from judicial scrutiny a contract which cuts back on petitioners' statutory right to minimum wage payments for all hours worked.

The decision of the court below also conflicts with the legislative history of the Act. By determining that petitioners' FLSA rights are, in effect, merged with their rights under the collective bargaining agreement, the decision transfers the responsibility for enforcing FLSA rights from the workers to their unions, which process grievance claims. In its deliberations leading up to the passage of the Act, and in the 1947 amendments to the Act, Congress took strong measures to ensure that it is the individual employee – and not his union – who is responsible for handling and pursuing FLSA claims. Since the decision below effectively gives sole control of workers' FLSA claims back to their unions, it impermissibly infringes on rights protected by the FLSA.

B.

In determining that the prior decision of the joint grievance committee foreclosed review of petitioners' FLSA claim, the court below departed from the principle of non-deferral laid down by this Court in *Gardner-Denver*. There, this Court held that in Title VII actions, courts should not defer to grievance decisions but must instead examine such statutory claims on the merits.

The rationale underlying the non-deferral principle of *Gardner-Denver* applies with equal force in the FLSA context. Title VII and the FLSA are both remedial statutes which accord employees distinct and independent rights; both vest ultimate enforcement responsibility in the courts; and both confer rights which cannot be prospectively waived. In light of the unmistakable parallels be-

tween the statutes, the lower court's refusal to follow *Gardner-Denver* was plainly in error.

Moreover, arbitration is an inadequate forum for the vindication of the important rights conferred by the FLSA. The role of the arbitrator is to interpret and apply the terms of the contract — not the dictates of public law. Arbitrators have no authority to decide statutory questions, nor do they have the special competence required to render the peculiarly judicial decisions required by the FLSA. Arbitrators also lack the authority to implement the broad range of remedies mandated by the FLSA. Thus, despite the critical role the FLSA's liquidated damage provision was intended to play both as a deterrent to employer violations and as a means to ensure full compensation to aggrieved workers, the remedy could not be enforced by arbitrators. It is evident that arbitration is no more suitable as a means of protecting FLSA rights than it is for protecting rights under Title VII. Accordingly, the lower court was incorrect in ruling that petitioners' FLSA rights may properly be relegated to the arbitral forum.

C.

In dismissing petitioners' FLSA claims, the majority below found support for its result in the national policy favoring arbitration as a means of resolving labor disputes. However, this policy is not as broad in its sweep as the lower court suggests; rather, as prior decisions of this Court establish, the arbitral forum does not displace adjudication of statutory claims. While contract rights should be pursued in the arbitral forum, statutory rights are to be given effect by the courts.

ARGUMENT

A. The Decision Below Conflicts With the Statutory Scheme of the FLSA

Congress enacted the FLSA in 1938 to eliminate "labor conditions detrimental to the maintenance of minimum standards of living necessary for health, efficiency and general well-being of workers." 29 U.S.C. § 202(a). To achieve these sweeping social goals, the FLSA sets out a strict policy of guaranteed minimum wage compensation for all hours worked and a premium rate of pay for overtime work. 29 U.S.C. §§ 206, 207. In light of the remedial nature of the statute, this Court has repeatedly held that rights conferred by the FLSA cannot be abridged by contract or otherwise prospectively waived. *Schulte v. Gangi,* 328 U.S. 108 (1946); *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 706-708 (1945); *Tennessee Coal, Iron R.R. v. Muscoda Local No. 123,* 321 U.S. 590, 601-603 (1944).

Congress placed the responsibility for enforcement of the FLSA's guarantees with both state and federal courts. Under the Act, courts are authorized to grant injunctive relief and award double damages and attorney's fees in all cases where the employee prevails. 29 U.S.C. § 216(b). To ensure effective enforcement, Congress has armed workers with a broad right to file suit and authorized the Secretary of Labor to bring both injunctive and back-pay actions on behalf of workers. 29 U.S.C. § 216(c).

In keeping with the statutory scheme, petitioners brought this action under the FLSA, alleging that they were entitled to at least minimum wage compensation for the time spent conducting pre-trip inspections and, if defects were found, driving the vehicles to the repair facility. The court below held that petitioners, by having their union pursue their grievances under the wage provisions of the collective bargaining agreement through the joint

grievance committee, had waived their right to maintain this action against ABF for violation of their rights under the FLSA. The lower court cited no statutory authority for this result, and none exists. Petitioners had complied in all respects with the statutory requisites for bringing suit. There is no statutory provision for waiver of the right to sue, nor is there any provision of the FLSA which mandates withdrawal of jurisdiction on account of prior arbitration of similar contract issues. To the contrary, the FLSA grants courts jurisdiction to adjudicate FLSA claims without restriction or qualification, apart from that of timeliness, and petitioners' suit was timely filed. Accordingly, the decision below runs directly counter to the broad jurisdictional provisions of the FLSA.

The decision below is also at odds with the settled principle that rights secured by the FLSA may not be abrogated by contract or waived during the collective bargaining process. In *Tennessee Coal, Iron R.R. v. Muscoda Local No. 123, supra,* this Court admonished, in language equally apt here, that in enacting the FLSA,

> Congress intended . . . to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that policy, like an agreement to pay less than minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.

321 U.S. at 602-603. *Accord, Brooklyn Savings Bank v. O'Neil, supra,* 324 U.S. at 707; *Schulte v. Gangi, supra,* 328 U.S. at 116.

In the face of this well-settled principle of law, the ruling of the majority below effectively insulates from

judicial scrutiny an agreement which plainly "deprive[s] employees of their statutory right[]" to compensation. Here, there can be little doubt that the time petitioners spend conducting the pre-trip inspection of their vehicles and driving them to ABF's repair facility when defects are found, is compensable under the FLSA since these activities are taken in ABF's interest. *See Steiner v. Mitchell,* 350 U.S. 247 (1956); *Dunlop v. City Electric, Inc.,* 527 F.2d 394, 398-399 (5th Cir. 1976); *Mitchell v. Mitchell Truck Line, Inc.,* 286 F.2d 721, 725 (5th Cir. 1961). The district court found that this time "is on the employer's business" (Pet. App. 4a), a finding the Eighth Circuit had "little quarrel with." (Pet. App. 21a). Nonetheless, the decision below effectively permits a collective bargaining agreement to cut back on rights conferred by the FLSA, a result that is plainly impermissible under the prior decisions of this Court.

Nor can the ruling of the majority below be squared with the FLSA's legislative history. Congress never envisioned that the enforcement of FLSA rights would be entrusted to arbitration or to grievance committees. Indeed, Congress has repeatedly taken measures to ensure that the grievance process does not intrude upon the judicial channels established for enforcing FLSA claims. During its deliberations on the proposed Act, Congress declined to adopt a version advocated by management interests to provide for enforcement of the FLSA through the grievance process. Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess. 694-695 (1937) ("Joint Hearings").

Congress also specifically rejected a proposal to exempt workers in industries or occupations which had been unionized from the minimum wage and hour provisions of

the Act. An early House bill provided that where a "substantial portion of the employees" in a given industry or occupation were covered by "collective bargaining agreements" and the "facilities for collective bargaining" were adequate to accomplish the purposes of the Act, the minimum wage and maximum hour provisions would not apply. H.R. Rep. No. 1452, 75th Cong., 1st Sess. 15 (1937). Although the proposal was discussed at length, *see, e.g.*, Joint Hearings at 278-281, Congress rejected this effort to exclude unionized workers from the ambit of the statute. Instead, Congress chose the far more limited course of giving effect to collective bargaining agreements in only two narrow areas concerning the calculation of overtime, *see* 29 U.S.C. § 207(b)(1) & (2), and thus plainly "did not intend that other collective bargaining agreements should relieve employers from paying . . . [the minimal standards laid down in the Act] regardless of the provisions of such contracts." *Tennessee Coal, Iron R.R. v. Muscoda Local No. 123, supra,* 321 U.S. at 602 n.18.

Petitioners' claim is further bolstered by the Portal-to-Portal Act amendments to the FLSA. In 1947, Congress deleted the portion of section 216(b) which had provided that "employees may designate an agent or representative to maintain" an action on their behalf. 61 Stat. 87. The stated purpose of the amendment was to remove unions from any role in pursuing FLSA claims on behalf of their members. S. Rep. No. 48, 80th Cong., 1st Sess. 2, 49 (1947). By placing the right to bring suit in the employee's own hands, Congress further strengthened the role of the individual employee in enforcement of the statute's requirements. In so doing, Congress made clear that it was the workers – not their unions – who should have control of their FLSA claims.

When viewed in light of the 1947 amendment to the

FLSA, the error of the court below becomes even more apparent. While that amendment was intended to oust unions from any role in pursuing FLSA claims on behalf of their members, under the lower court's theory, FLSA claims would be subordinated to contract claims, since it is settled doctrine that it is the union – and not the individual employee – which is responsible for the handling and processing of contract grievances. *See Vaca v. Sipes,* 386 U.S. 171, 182 (1967). As a result, the decision of the Eighth Circuit runs directly counter to the FLSA's legislative history and the holdings of this Court in *Tennessee Coal, Brooklyn Savings Bank v. O'Neil* and *Schulte v. Gangi,* and thus cannot be sustained.

B. This Court's Decision In *Gardner-Denver* Establishes That Deferral Is Not Appropriate Where, As Here, The Rights At Stake Are Conferred By Statute, And Congress Has Vested Enforcement Responsibility In The Courts

In ruling that submission of a wage claim to a grievance committee bars access to the courts to enforce rights secured by the FLSA, the court below also strayed far from the teachings of this Court in *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974). There, the Court unanimously held that in Title VII cases, federal courts were not foreclosed from examining *de novo* claims of racial discrimination, even where the underlying claim had been the subject of binding arbitration under the anti-discrimination provisions of a collective bargaining agreement. In so holding, the Court emphasized that the following attributes of Title VII, taken together, counseled against deferral: the statute is remedial in nature and accords employees distinct independent rights which cannot be prospectively waived, 415 U.S. at 51; it vests "final

responsibility for enforcement" in the courts, *id.* at 44; it depends primarily upon private enforcement actions, *id.* at 45; and it is "designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination," *id.* at 48-49.

The rationale underlying the non-deferral principle articulated in *Gardner-Denver* applies with equal force in the FLSA context. Title VII and the FLSA are congruent in all critical respects. The FLSA, like Title VII, is "remedial and humanitarian in purpose." *Tennessee Coal, Iron R.R. v. Muscoda Local No. 123,* 321 U.S. 590, 597 (1944). Forged during the depression, the FLSA was enacted to eliminate "labor conditions detrimental to the maintenance of minimum standards of living necessary for health, efficiency and general well-being of workers," 29 U.S.C. § 202(a), by ensuring at least a minimum wage for all hours worked and a premium rate for overtime work. *See Overnight Motor Co. v. Missel,* 316 U.S. 572, 576, 578 (1942); *Brooklyn Savings Bank v. O'Neil, supra* 324 U.S. at 706-708. As President Franklin Delano Roosevelt emphasized in his message sending the bill to Congress, under the Act workers would receive "[a] fair day's pay for a fair day's work" and thus be shielded from the evils of "overwork" as well as "underpay." 81 Cong. Rec. 4983 (1937); *quoted in Overnight Motor Co. v. Missel, supra,* 316 U.S. at 578. Recognizing the humanitarian underpinnings of the Act, this Court has cautioned that the provisions of the FLSA, like those of Title VII, "must not be interpreted or applied in a narrow and grudging manner," but rather construed broadly, to accomplish the Act's remedial purpose. *Tennessee Coal, Iron R.R. v. Muscoda Local No. 123, supra,* 321 U.S. at 597.

Equally important, the FLSA, like Title VII, creates distinct statutory rights which directly benefit the affected

worker. Thus, under the FLSA, covered workers have the right to be paid the minimum wage for all hours worked, to receive overtime pay for hours worked in excess of the statutory standard, and to bring suit to enforce these rights. 29 U.S.C. §§ 206, 207, 216(b). Moreover, to protect these rights fully and to provide the "deterrent effect which Congress intended that §16(b) should have," this Court has repeatedly held that the rights granted by the FLSA are "statutory right[s] conferred on a private party" which may not be waived or bargained away. *Brooklyn Savings Bank v. O'Neil, supra,* 324 U.S. at 704-705, 709. *See also Schulte v. Gangi, supra,* 328 U.S. at 114.

The parallel nature of the two statutes is also exhibited in their enforcement schemes. As in Title VII, Congress intended affected workers to shoulder the primary responsibility for enforcing the FLSA's requirements. The statute itself could hardly be more explicit: an "action to recover such liability [under the minimum wage and overtime provisions] may be maintained . . . by any one or more employees for and in behalf of himself or themselves or other employees similarly situated." 29 U.S.C. § 216(b); *see also Brooklyn Savings Bank v. O'Neil, supra,* 324 U.S. at 705-706, n.16. Only the Secretary of Labor shares the burden of enforcing the statute, and his authority to bring back-pay actions is expressly derivative from that of an affected employee. 29 U.S.C. § 216(c).

The legislative history confirms Congress' intention that employees assume the lead role in enforcing the Act. The provisions of section 216(b) appeared for the first time in a bill reported by a Conference Committee of both Houses. H. Rep. No. 2738, 75th Cong., 3d Sess. 33 (1938). While the debates in both Houses prior to the adoption of the Conference Report were quite brief, 83 Cong. Rec.

9158-78, 9246-67, the one reference to section 216(b) is highly instructive. Representative Keller noted:

> If there shall occur violations of either the wage or hours, the employees can themselves, or by designated agent or representative, maintain an action in any court to recover the wages due them . . . The provision has the further virtue of minimizing the cost of enforcement by the Government . . . [because it] puts directly into the hands of the employees who are affected by violation the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the act.

83 Cong. Rec. 9264 (1938). Thus, Congress left no room for doubt that it intended the affected employee to assume the principal duty of enforcement.[2]

Similarly, as with Title VII, Congress reposed in the courts the sole responsibility for enforcement of the FLSA's dictates. The statute provides that an action to enforce the FLSA "may be maintained in any court of competent jurisdiction" and that "the court in such action" shall impose the remedies provided for in the statute. 29 U.S.C. § 216(b). No other means of enforcement is provided. In this respect, the need to preserve unfettered access to the courts under the FLSA is even more pronounced than under Title VII. In Title VII, Congress vested the Equal Employment Opportunity Commission and state agencies with the authority to investigate and mediate claims of racial discrimination as a means of ob-

[2]This conclusion is fortified by the 1947 amendment to the FLSA which deleted the provision of section 216(b) permitting actions to be brought on behalf of workers by their designated agents or representatives. *See* p. 14, *supra*.

viating the need for court enforcement. Moreover, to ensure full opportunity for conciliation, Title VII requires consideration by such an agency as a prerequisite to legal action. *See Mohasco Corp. v. Silver,* 100 S.Ct. 2486 (1980). By contrast, the Department of Labor has no authority to encourage settlement of FLSA claims. Nor does the FLSA contain exhaustion requirements of any sort. To the contrary, the FLSA grants "any court of competent jurisdiction" plenary authority to adjudicate and enforce FLSA rights without restriction, aside from that of timeliness. The absence of any deferral period or other jurisdictional prerequisites underscores Congress' intent to allow FLSA plaintiffs unencumbered access to the courts.

An additional, important parallel between the statutes is that they both were intended to supplement, rather than supplant, existing legislation and institutional practices. In enacting the FLSA, Congress expressly disavowed any interest in abrogating labor contracts which provided for higher wage floors. *E.g.,* 83 Cong. Rec. 9177 (1938). Congress also did not intend to displace or pre-empt state laws setting *higher* minimum standards. 29 U.S.C. § 218. On the contrary, throughout the legislative debates leading up to its passage, it was understood that the legislation would do no more than provide floors below which no employer subject to the Act could fall. 83 Cong. Rec. 9164, 9256-58 (1938). In this respect, the FLSA mirrors Title VII, which Congress intended to be applied in tandem with other statutes. *Alexander v. Gardner-Denver, supra,* 415 U.S. at 48-49.

Despite the unmistakable parallels between Title VII and the FLSA, the court below rejected application of the non-deferral principle laid down in *Gardner-Denver,* asserting, without explanation, that since the FLSA involves "simple wage claims" which have traditionally been

the subject of arbitration, deferral was appropriate (Pet. App. 25a). To support its ruling, the lower court relied heavily on *Satterwhite v. United Parcel Service,* 496 F.2d 448, 452 (10th Cir.), *cert. denied,* 419 U.S. 1079 (1974), in which the court held that "when a wage dispute is submitted to arbitration in accordance with a collective-bargaining agreement, the employees may not thereafter maintain an FLSA § 16(b) suit for recovery on the same factual occurrence as that presented to the arbitrator." The linchpin of the holding below, and that in *Satterwhite,* was the premise that "[i]n a context of racial discrimination the right of an employee to be free from discrimination may well be thought to stand in more need of protection than conventional arbitration of a simple wage dispute may provide." (Pet. App. 25a).

There are several reasons why the distinction between Title VII and the FLSA fashioned by the court below is not sound. In the first place, the statutes are symmetrical in all critical respects, and thus there is no *statutory* basis for concluding that the non-deferral principle of *Gardner-Denver* is inapplicable. Indeed, the ruling below gives short shrift to the decision of the District of Columbia Circuit in *Leone v. Mobil Oil Co.,* 523 F.2d 1153 (D.C. Cir. 1975), which held, in a somewhat different procedural setting, that *Gardner-Denver* applies in the FLSA context.

Second, it is not the proper role of the courts to measure the relative importance of different remedial statutes enacted by Congress, and thus effectively undermine the enforcement schemes of those statutes considered of lesser importance. The lower court's ruling that FLSA claims are somehow worthy of less vigilant protection than Title VII claims is devoid of support. Congress has never declared that eradicating discrimination through Title VII is a more pressing societal goal than ensuring through the FLSA that workers are not forced to work excessive

hours, work without compensation, or be denied overtime payments. Indeed, as noted above, *see* p. 16, *supra,* this Court has long recognized the vital policy underpinnings of the FLSA.

Most important, however, any suggestion that the arbitration process is better suited to enforce FLSA rights than it is to protect rights accorded by Title VII is without foundation. This Court has often admonished that "the choice of forums inevitably affects the scope of the substantive right to be vindicated." *Gardner-Denver, supra,* 415 U.S. at 56, *quoting U.S. Bulk Carriers v. Arguelles,* 400 U.S. 351, 359-360 (1971) (Harlan, J., concurring). *See also Bernhardt v. Polygraphic Co.,* 350 U.S. 198, 203 (1956), *Wilko v. Swan,* 346 U.S. 427, 434-439 (1953). In section 216(b), Congress expressly provided that courts should decide claims involving the wage and hours provisions of the FLSA, and set forth the rights of employees in terms of their right to bring suit for recovery under the statute. The statute is written in terms of *court* enforcement. The substantive provisions of the Act which depend on judicial enforcement are, of course, " an important part of the parcel of rights" conferred by the FLSA. *See Bernhardt v. Polygraphic Co., supra,* 350 U.S. at 203.

There are several fundamental differences between arbitration and court review which underscore the importance of recognizing that rights established by statute should be judicially enforceable even if contract rights are not. The most fundamental difference is that the role of the arbitrator is to interpret and apply the provisions of the contract – not to safeguard rights guaranteed by statute. Indeed, the arbitrator has no general authority to invoke public law, even where there is a conflict between the dictates of a statute and the bargain between the parties. As this Court emphasized in *Gardner-Denver* "if an arbitral decision is based 'solely upon the arbitrator's view

of the requirements of enacted legislation,' rather than on an interpretation of the collective bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced." 415 U.S. at 53, *quoting United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Yet as this Court has often noted, and as this case illustrates, contract rights may well cut back rights secured by the FLSA. *See, e.g., Overnight Motor Transport Co. v. Missel,* 316 U.S. 572 (1943); *Tennessee Coal, Iron R.R. v. Muscoda Local No. 123, supra; United States v. Burnette,* 546 F.2d 187, 189 (5th Cir. 1977). Nonetheless, the arbitrator would be bound to enforce the contract, even though by so doing he would be undermining rights accorded by the FLSA.

Nor could an arbitrator impose the full range of statutory remedies. For example, this Court has held that the minimum wage, overtime compensation, and double damages provisions of the FLSA cannot be waived or bargained away. *Brooklyn Savings Bank v. O'Neil, supra,* 324 U.S. at 706-708; *Schulte Co. v. Gangi, supra,* 328 U.S. at 114. Those decisions were predicated on the recognition that these rights form the core of the FLSA and must be fully enforced to effectuate the statute's goals. Yet it is highly doubtful that an arbitrator could do more than award compensation under the contract's wage provisions. Even though they are mandated by statute, an arbitrator could not assess liquidated damages, nor award statutory overtime payments or attorney's fees, since he "is confined to interpretation and application of the collective bargaining agreement" and his "award is legitimate only so long as it draws its essence" from the agreement. *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra,* 363 U.S. at 597. Certainly, the collective bargaining agreement here confers no such expansive authority on the joint grievance committee.

Even aside from these fundamental drawbacks, other problems exist as well. First, arbitrators, and particularly members of joint grievance committees, who are drawn from the ranks of management and union leadership, are without special expertise in the interpretation and application of statutory rights. *See U.S. Bulk Carriers v. Arguelles, supra,* 400 U.S. at 360-362 (Harlan, J. concurring). Indeed, many arbitrators, and virtually all of the members of joint grievance committees, are not lawyers. *See* Note, *The NLRB and Deference to Arbitration,* 77 Yale L.J. 1191, 1194 n.28 (1968). Thus, while arbitrators, expert in the "industrial common law — the practices of the industry and the shop", may well be ideally suited to construe and enforce collective bargaining agreements, these skills have little to do with the judicial tasks required in interpreting the FLSA.

In sum, the majority below was seriously in error in concluding that *Gardner-Denver* does not apply with equal force in the FLSA context. As is evident, the structure of Title VII and the FLSA mirror one another in all critical respects. Moreover, grievance procedures provide no more a bulwark to protect FLSA rights than they do to protect Title VII rights. Absent meaningful access to the courts, FLSA rights may be altered, abrogated, or bargained away, while employees remain powerless to enforce those rights. Indeed, in the *Satterwhite* decision relied upon by the court below, the Tenth Circuit acknowledged that the arbitrator there had reached a "compromise" decision which might well have undercut FLSA rights. 496 F.2d at 449. Since this kind of compromise result is antithetical to the statutory scheme of the FLSA and in conflict with the thrust of the Court's ruling in *Gardner-Denver,* the decision below should be reversed.[3]

[3]The potential for compromise is further heightened by the particular form of grievance procedure used in this case, in which the

C. Non-Deferral In FLSA Cases Will In No Way Undermine The National Policy Favoring Arbitration

Despite the absence of any statutory basis for relegating FLSA statutory rights to arbitration, the majority below foreclosed petitioners' right to judicial consideration of their FLSA claim because of what it perceived to be the dictates of national labor policy. For support, the majority cited section 203(d) of the National Labor Relations Act, 29 U.S.C. § 173(d), which provides that final adjustment "by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes." In the *Steelworkers Trilogy*,[4] this Court held that under section 203(d), if employers and unions arbitrate contract grievances in accordance with the provisions of their collective bargaining agreement, they may be precluded from going to court, noting that "so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their

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neutral arbitrator is replaced by an equal number of union and employer representatives. The strength of the joint committee system is that it permits the parties to negotiate over unanticipated ambiguities in the collective bargaining agreement even after it has been signed and ratified. *See* Azoff, *Joint Committees as an Alternative Form of Arbitration Under the NLRA*, 47 Tul.L.Rev. 325, 327 (1973). This very feature, although functionally similar to arbitration for the purpose of contract dispute resolution, *General Drivers, Warehousemen & Helpers Local No. 89 v. Riss*, 372 U.S. 517 (1963), makes the joint committee process especially unsuitable for resolution of FLSA claims, which may not be negotiated away through the collective bargaining process or, as in this case, through a "side deal." Petitioners wish to make clear that while they elected not to challenge the Eighth Circuit's disposition of their contract grievance claim, they believe it was also erroneous.

[4] *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

interpretation of the contract is different than his." *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra,* 363 U.S. at 599. And in *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965), this Court held that contract grievance procedures must be exhausted prior to submission of contract claims to the courts.

The reliance of the majority below on this policy of deferral to arbitration was seriously misplaced. The holdings of these cases fall far short of requiring a court to accept an arbitrator's denial of a contractual claim as dispositive of a distinct, independent claim under a statute. The Court's opinions in those cases stand squarely for the primacy of arbitration as a means of resolving questions arising under collective bargaining agreement; but they in no way undercut the responsibility Congress has entrusted to the courts to resolve statutory claims. Neither Congress nor this Court has ever even hinted that arbitration is an appropriate means of vindicating a worker's statutory rights that exist independent of any contract.

Prior decisions of this Court confirm that the arbitral forum does not displace the courts in the adjudication of *statutory* claims. In at least three decisions, this Court has expressly ruled that statutory rights and those conferred by collective bargaining agreements are properly enforced in different forums. Most recently, in *Gardner-Denver, supra,* the Court unanimously rejected an argument analogous to that raised here, concluding that claims of racial discrimination could be raised both before the courts under Title VII and through grievance procedures spelled out in the employee's collective baregaining agreement. Similarly, in *U.S. Bulk Carriers v. Arguelles,* 400 U.S. 351 (1971), the Court held that federal courts are not precluded from passing on the merits of a claim under the

Seaman's Wage Act, 46 U.S.C. § 596, even where the seaman failed to first invoke the contractual grievance machinery. In his concurring opinion, Mr. Justice Harlan distinguished his opinion for the Court in *Republic Steel v. Maddox, supra,* observing that where the substantive rights being asserted are "derived solely from the contract," strong policy considerations warrant the exclusivity of the arbitral forum. But where a right is claimed under a federal statute, Justice Harlan maintained, "the presumption of comprehensiveness of the arbitral remedy is . . . rebutted" and remedies prescribed by statute for vindication of statutory rights remain available. 400 U.S. at 361-65.[5]

In the same vein, in *McKinney v. Missouri-Kansas-Texas R.R.*, 357 U.S. 265 (1958), this Court held that a serviceman, returning to his prior place of employment after military service, could enforce his seniority rights under the Universal Military Training and Service Act, 50 U.S.C. App. § 459, without first submitting his claim to arbitration under the terms of his collective bargaining agreement. The Court's reasoning suggests that even if the plaintiff had first asserted his contractual rights through arbitration, he would nonetheless have been entitled to bring an action under the statute. *See* 357 U.S. at 270.

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[5]In one critical respect, this case is far more compelling than *Arguelles.* There, the claimant's statutory and contractual claims were intertwined – *i.e.,* whether, and to what extent, he was entitled to the statutory remedy depended "entirely on interpretation and application of the contract." 400 U.S. at 371 (White J., dissenting). By contrast, FLSA rights apply in the same measure regardless of whether a collective bargaining agreement exists or whether the agreement contains minimum wage and maximum hour provisions identical to those set forth in the Act.

Thus, the decisions of this Court strongly reinforce petitioners' claim that, although contract rights are to be pursued through the arbitral process, statutory rights may be vindicated in the courts. This principle applies *a fortiori* where, as here, the statute confers a right upon individuals that exists totally independent of those conferred by contract and assigns the responsibility for its enforcement to the courts. Petitioners submit that the courts below strayed far from this principle in merging petitioners' contractual and statutory claims, without giving due recognition to the fact that FLSA rights are legally separate and distinct from those created by contract. Indeed, Justice Douglas, who, as architect of the *Steelworkers Trilogy,* was a vigorous defender of the primacy of the arbitral process, reached the same conclusion in his forceful dissent from the dismissal of the writ of certiorari as improvidently granted in *Iowa Beef Packers v. Thompson,* 185 N.W.2d 738 (Iowa 1971), noting that *Arguelles* "which kept the courthouse door open, would seem to control this case." 405 U.S. 228, 231 (1972).

As the Court emphasized in *Gardner-Denver,* there is no reason why contract rights and statutory rights should not both be given full protection by allowing an employee's claim to be resolved in the appropriate forum with respect to each of his distinct rights. Indeed, there is nothing novel about this proposition. *See Carey v. Westinghouse Electric Corp.,* 375 U.S. 261, 272 (1964) (setting forth essentially the same procedures under the National Labor Relations Act); *Marshall v. N.L. Industries, Inc.,* 618 F.2d 1220 (7th Cir. 1980) (prior submission of safety claim did not foreclose subsequent action brought by Secretary of Labor under the Occupational Safety and Health Act); *Air Line Pilots Ass'n v. Northwest Airlines, Inc.,* 627 F.2d 272, 277-278 (D.C. Cir. 1980) (court retains jurisdiction to

hear claims under the Employee Retirement Income Security Act of 1974 even though other aspects of same transaction may have to be decided by compulsory arbitration). Moreover, preserving the option of arbitration will encourage employees seeking prompt and inexpensive relief to first invoke their grievance procedure, thereby lessening the likelihood of labor strife and decreasing the burden placed on the courts. *See Gardner-Denver, supra,* 415 U.S. at 55. By the same token, preservation of judicial review will ensure that FLSA rights are fully vindicated.[6]

In sum, while Congress has not expressly spoken on the appropriate relationship between arbitration and rights accorded by the FLSA, other pronouncements by Congress and the decisions of this Court strongly suggest that arbitration should be viewed as another means by which relief from substandard wages or oppressive working hours may be sought, without depriving individuals of their statutory right to court review of their FLSA claims.

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[6]To be sure, in some instances courts reviewing FLSA claims may consider prior arbitration decisions on related contract issues. Although the Court in *Gardner-Denver* expressly declined to "adopt standards as to the weight to be accorded an arbitral decision," it noted that under certain circumstances a court might properly accord a prior aribtral decision substantial weight. 415 U.S. 60 n.21. As in *Gardner-Denver,* there is no need to examine that question in this case. In any event, the decisions of the joint grievance committee here should be given no weight at all. There is no evidence to suggest that petitioners' FLSA claim was submitted to, let alone considered by, the joint grievance committee, nor did the committee issue any written decision. Thus, here there simply is nothing in the record to which weight could be accorded. For this reason, even on this issue, the decision in *Union de Tronquistas de Puerto Rico, Local 901 v. Flagship Hotel Corp.*, 544 F.2d 8 (1st Cir. 1977), relied on heavily by the court below, is inapposite. There, in sharp contrast to this case, the employees' claim, which arose under an administrative regulation, was expressly submitted to, and resolved by, the arbitrator. 544 F.2d at 9-10.

Both federal labor policy and the policies underlying the FLSA can be most fully realized by "permitting an employee to pursue fully both his remedy under the grievance arbitration clause of a collective bargaining agreement and his cause of action" under the statute. *Gardner-Denver, supra,* 415 U.S. at 59-60. Indeed, petitioners submit that this is the only approach which fully effectuates Congress' intention to preserve all avenues to root out substandard wages and oppressively long working hours.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 20, 1980

No. 79-2006

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LLOYD BARRENTINE, CLYDE G. EDWARDS, CLEO KEENEY, MAXIE BLANTON, JOHNNY ROBINSON, CHARLEY DEATON, H.E. MITTCHELL, AND L.R. YOUNG, *Petitioners,*

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN, LOCAL 878, AND A.J. PICKERING, PRESIDENT, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT

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December 19, 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

A.

Can an employee maintain an action under FLSA for wages after he has submitted a claim for wages based on the same facts to a grievance committee pursuant to the collective bargaining agreement and had the claim denied when a subsequent review of the grievance proceedings by a federal court finds the employee was fairly represented?

B.

Does an employee's failure to comply with the requirements of 29 U.S.C. §216(b) and 29 U.S.C. §256 bar an action under FLSA?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii, iv, v
STATEMENT OF THE CASE	1
Summary Of Argument	2
Argument	
A. The Decision Below Properly Reflects The Federal Labor Policy Of Encouraging Labor Peace By Enforcing Arbitration Provisions Of Collective Bargaining Agreement	3
B. The FLSA Claim Of The Employees Is Barred And Is Not Properly Before The Court Because Of The Failure Of The Employees To Comply With The Requirements Of The 29 U.S.C. §216(b) and 29 U.S.C. §256	21
CONCLUSION	25

TABLE OF AUTHORITIES

CASES:	PAGE
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1974)	13, 14, 17
Atterburg v. *Anchor Motor Freight Inc.*, 425 F. Supp. 841 (D.N.J. 1977)	17
Barrentine v. *Arkansas-Best Freight System, Inc.*, 615 F.2d 1194 (1980)	19
Beckley v. *Tessier*, 332 F.2d 495 (9th Cir. 1964)	7
Burrell v. *LaFollette Coach Lines*, 97 F. Supp. 279 (1951)	22
Donahue v. *Susquehanna Collieries Co.*, 138 F.2d (3rd Cir. 1943)	4, 8
Employees of Department of Public Health and Welfare v. *Missouri*, 411 U.S. 279, 93 S.Ct. 1614	14
Evans v. *Hudson Coal Co.*, 165 F.2d 970 (3rd Cir. 1948)	5

PREVIOUS PAGE WAS BLANK

Table of Authorities Continued

CASES: PAGE

Grosheck v. *Babcock and Wilcox Tublar Products Div.*, 425 F. Supp. 232 (1977) 23

International Longshoreman's Association v. *Sea Land Services*, 430 F. Supp. 282 (P.R. 1975) 16

Kulik v. *Superior Pipe Specialties Co.*, 203 F. Supp. 938 (Ed.Ill. 1962) 24

LaChapelle v. *Owens, Illinois*, 513 F.2d 286, 288 (5th Cir. 1975) 23

Leone v. *Mobil Oil Co.*, 523 F.2d 1153 (D.C. Cir. 1975)... 19

Republic Steel Corp. v. *Maddox*, 379 U.S. 650, 85 S.Ct. 614 (1965) 8, 9, 13, 14, 16

Satterwhite v. *United Postal Service, Inc.*, 496 F.2d 448 (10th Cir. 1974)..... 14, 16, 17, 19, 21

Sims, et al v. *Parke Davis Company*, 453 F.2d 259 (6th Cir. 1971) *cert. den.* 405 U.S. 978 (1972)..... 24

Tennessee Coal Iron R.R. Co. v. *Muscoda Local No. 123*, U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949, rehearing denied 322 U.S. 771, 64 S.Ct. 1257, 88 L.Ed. 1596 (1944) 18, 19, 20, 21

Textile Workers Union v. *Lincoln Mills of Ala.*, 353 U.S. 448, 77 S.Ct. 912 (1957) 6

Union de Tronquistos de Puerto Rico, Local 901 v. *Flagship Hotel, Corp.*, 554 F.2d 8 (1st Cir. 1977)..... 17

U.S. Bulk Carriers, Inc. v. *Arguelles*, 400 U.S. 351 (1971)..... 2, 10, 11, 12, 13

United Steelworkers of America v. *American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343 6

United Steelworkers of America v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960)..... 6

United Steelworkers of America v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347 6

Table of Authorities Continued

STATUTES AND REGULATIONS:	PAGE
National Labor Relations Act	
29 U.S.C. §173(d)	3
Fair Labor Standards Act	
29 U.S.C. §206(b)	20
29 U.S.C. §216(b)	3, 21, 23, 24
29 U.S.C. §254	20
29 U.S.C. §256	3, 21, 22, 23, 24
Interstate Commerce Act	
49 U.S.C. §304	19
Federal Motor Carrier Safety Regulations	
49 C.F.R. §390, et seq	18
49 C.F.R. §392.7	19
49 C.F.R. §396.4 (1979)	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-2006

LLOYD BARRENTINE, CLYDE G. EDWARDS, CLEO KEENEY, MAXIE BLANTON, JOHNNY ROBINSON, CHARLEY DEATON, H.E. MITTCHELL, AND L.R. YOUNG, *Petitioners,*

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN, LOCAL 878, AND A.J. PICKERING, PRESIDENT, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The petitioners' statement of the case is substantially complete except as modified herein: The grievance filed by the petitioner, Barrentine, stated, *inter alia*:

> "Federal Wage Laws also state that this is compensable time." (J.A. 21)

The respondent has not and does not concede that the FLSA claim of the employees was not submitted to or considered by the Grievance Committee. To the contrary, the respondent's position is that such claim was

submitted to and considered by the Grievance Committee and was determined in favor of the respondent.

The trial court reviewed the grievance proceedings *de novo* and concluded that the proceedings were fair and that the union had not failed in its duty of fair representation to the petitioners. (Pet. App. 12a)

The trial court took into consideration in its affirmance of the decision of the Grievance Committee[1] that a Central States Grievance Committee in a similar case involving East Texas Motor Freight also held the D.O.T. safety inspection time non-compensable. (Pet. App. 11a)

SUMMARY OF ARGUMENT

There is a strong federal policy, both congressional and judicial, which has historically held that the settlement of labor disputes by arbitration, where the parties have provided by contract for the arbitration of disputes, is to be supported and encouraged by specific enforcement of the arbitration clauses. Claims for wages arising under the Fair Labor Standards Act have not been excluded from this broad federal policy except for the aberrational decision of *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351 (1971).

In order to meet the reasonable expectations of all parties to a collective bargaining agreement, judicial support and enforcement of the terms of a collective bargaining agreement in the area of wages and hours should be encouraged by this Court. A doctrine which permits any party to a labor contract multiple oppor-

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[1] This Grievance Committee is a Southern States Committee.

tunities to litigate the same factual question without a binding resolution encourages litigation and promotes instability and increases the potential for labor disputes and unrest and is contrary to public policy.

Safety inspections which Congress has determined are the responsibility of employees and which Congress has removed from the control of the employer do not constitute "time worked" for the purposes of the FLSA. Congress has chosen to place the financial burden (although *de minimis* it is) of the Department of Transportation safety inspection on the shoulders of the employees rather than the employers.

The failure of the petitioners to comply with the requirements of 29 U.S.C. §216(b) and 29 U.S.C. §256 is fatally defective to their claims. Since none of the petitioners filed written consents to the maintenance of the action, this action has not been properly commenced and the petitioners are not properly parties.

A. The Decision Below Properly Reflects The Federal Labor Policy Of Encouraging Labor Peace By Enforcing Arbitration Provisions Of Collective Bargaining Agreements.

There is no more basic labor dispute than one arising out of wages and hours. There is a strong federal policy favoring arbitration as the means of resolving labor disputes. This policy manifests itself in Section 203 of the Labor Management Relations Act of 1947, 29 U.S.C. §173(d) which provides, *inter alia*:

> "(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.. . ."

Strong judicial support of this congressional policy has been evidenced by the courts for approximately forty (40) years.

The judicial support for the policy has not in the past been limited or bifurcated as the Petitioners and Amicus now urge the Court. Historically, the judicial approach has been to hold that the arbitration process is adequate to resolve wage claims based on the FLSA.

In *Donahue* v. *Susquehanna Collieries Co.*, 138 F.2d 3 (3rd Cir. 1943), the plaintiff employees sued the employer under the FLSA seeking recovery of amounts alleged to be due them for overtime work for which they claimed they had not been paid and were entitled to by virtue of the FLSA. The contracts under which the employees were employed contained a provision for arbitration of "any difficulty or disagreement "* * * growing out of the relations of employers and employed." *Donahue, supra*, at page 4. One of the specific issues raised was whether the arbitration clause could be applied where the plaintiff's claim was one to recover damages under the FLSA. The *Donahue* Court in analyzing the issue, at page 6, stated:

> "Is there anything about the Fair Labor Standards Act which removes claims under its terms from the arbitration clause? We may concede that Congress could have done so had it wished. It could have provided that any claim under the Act was to be enforced by lawsuit only, notwithstanding any agreement between parties for any other method of settlement. There is no such express language.. . .
>
> "We think the terms of the contract in this case are broad enough to cover the claim in litigation. And we see nothing in the wording of the Fair Labor Standards Act which precludes arbitration of claims arising under it. No doubt it creates rights

which make a basis of a claim by an employee against an employer who violates it. So does any contract. A claim under the Act and a claim based on a contract, — each is based on a legal right which the claimant asserts against someone else. Arbitration is one way by which such a right can be enforced. There is no reason why it cannot be availed of to secure rights under the Fair Labor Standards Act just as well as a right arising out of a contract or imposed by law as a consequence of a tort.

"Here again we should not choke the arbitration process which has been given congressional approval by the fetters of earlier judicial conceptions."

In *Evans* v. *Hudson Coal Co.*, 165 F.2d 970 (3rd Cir. 1948), the suit by the employees, members of the United Mine Workers, was to recover regular and overtime wages, liquidated damages, attorneys' fees and costs under the FLSA. Additionally, they sought to have the collective bargaining agreement, itself, declared illegal as being in violation of the FLSA, *Evans, supra*, at page 972. The employer filed an application for stay pursuant to Section 3 of the United States Arbitration Act. The trial court held that the issues raised were referrable to arbitration pursuant to a contractual arbitration clause and the plaintiffs appealed. In holding that both issues were referrable to arbitration, the Court said at page 973:

"We concluded by stating, and this was the gist of our decision presently applicable to the instant case, that the questions of the days and hours on which a claimant worked and "the calculation of the amount of money to which he may be entitled under the (Fair Labor Standards) Act. * * *" is the kind of problem which is properly referable either

> to a special master or an arbitrator and that since the parties by contract had provided for arbitration the reference to arbitration was entirely appropriate."

See further at page 974 where that Court said:

> "It was not our intention to indicate that the arbitrators could not inaugurate and put into effect a new, proper and legal formula in lieu of that presently contained in Section 7 to the end that the requirements of the Fair Labor Standards Act might be effected. Our intention in fact was to the contrary."

This judicial support was reinforced by this Court in *Textile Workers Union* v. *Lincoln Mills of Ala.*, 353 U.S. 448, 77 S.Ct. 912 (1957) at page 915 where the Court said:

> ". . . 301(a) is more than jurisdictional . . . and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements."

And also at page 919 as follows:

> "The congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of §7 of the Norris-LaGuardia Act."

And also in the United Steelworkers trilogy, see *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 80 S.Ct. 1347; *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960).

In *Beckley* v. *Teyssier*, 332 F.2d 495 (9th Cir. 1964), the employees, represented by the United Brotherhood of Carpenters and Joiners of America, performed services for their employers pursuant to a collective bargaining agreement which contained the following language at page 496:

> "All grievances or disputes, other than jurisdictional disputes, arising out of the interpretation or application of any of the terms or conditions of this Agreement shall be submitted for determination and shall be determined by the procedure set forth in Article V, * * *."

The collective bargaining agreement further provided that the employees would travel to and from work on their own time and by their own means of transportation, *Beckley, supra*, page 496, and otherwise contained provisions for wage rates, working hours overtime pay and similar matters. The employees filed suit under the FLSA claiming that they had performed certain overtime work but for which no additional overtime compensation was paid. They contended the time spent by them in traveling to and from their work site constituted hours worked under the FLSA notwithstanding the contract provisions. They argued that the question of whether the FLSA had been violated was not proper for arbitration. See *Beckely, supra*, page 496:

> "Appellants support such contention by arguing that whether the time spent by them in travelling to and from the barracks to the job site constitutes hours worked under the Fair Labor Standards Act is a legal question which must be determined by the courts without reference to the provisions of the Collective Bargaining Agreement, and presents a question which cannot be determined by an arbitrator. Appellants cite no provision of the Fair

Labor Standards Act which precludes arbitration of claims arising under it. We have found none. As stated in *Donahue* v. *Susquehanna Collieries, supra*, 138 F.2d at page 6:

> "We may concede that Congress could have done so had it wished. It could have provided that any claim under the Act was to be enforced by lawsuit only, notwithstanding any agreement between parties for any other method of settlement. There is no such express language."

> "(2) It is clear to us that the claims of appellants are ones growing out of the relation of employer and employee and necessarily involve the application and interpretation of the contract provisions above quoted, and therefore fall squarely within Article V of the Collective Bargaining Agreement. See *Evans* v. *Hudson Coal Co.*, 165 F.2d 970 (3rd Cir. 1948). To sustain appellants' contention would be to emasculate the arbitration provisions contained in the Collective Bargaining Agreement."

In *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 85 S.Ct. 614 (1965), page 616, this Court said:

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. See *Humphrey* v. *Moore*, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370; *National Labor Relations Board* v. *Miranda Fuel Co.*, 2 Cir., 326 F.2d172.* * *
>
> * * *
>
> "A contrary rule which would permit an individual employee to completely sidestep available

> grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Local 174, Teamsters etc.* v. *Lucas-Flour Co.*, 369 U.S. 95, 103, 82 S.Ct. 571, 577, 7 L.Ed.2d 593."

The *Republic Steel Corp.* Court then went on to analyze whether or not the employee's claim for severance pay fell within the general federal rule described above or was so different as to justify an exception. The Court concluded that the severance pay was not substantially different from any other claim so as to justify an exception. The reason for treating the severance pay as any other type of grievance was based on the Court's rationale that as long as the decision would effect the future relations between the employer and other employees, the contract method agreed upon should be given support by the courts. See *Republic Steel Corp., supra*, at page 618:

> "Severance pay and other contract terms governing discharge are of obvious concern to all employees, and a potential cause of dispute so long as any employee maintains a continuing employment relationship."

And continuing further at page 618:

> "If applicable law permitted a court suit for severance pay in any circumstances without prior recourse to available contract remedies, an employer seeking to limit the modes of redress that

> could be used against him could do so only by eliminating contract grievance procedures for severance-pay claims."

Continuing at page 618:

> "There are, then, positive reasons why the general federal rule should govern grievances based on severance claims as it does others. Furthermore, no positive reasons appear why the general federal rule should not apply. "Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of Lincoln Mills," and "the subject matter of § 301 (a) 'is peculiarly one that calls for uniform law.'" *Local 174, Teamsters etc.* v. *Lucas Flour Co.*, 369 U.S., at 103, 82 S.Ct., at 576."

The question of pay presented in the instant case falls squarely within the rationale of the general federal rule in that all employees, present and future, performing the safety check are and would be concerned as to the outcome of the dispute, and so long as the Department of Transportation requires the safety check, the time in question would remain a potential cause of dispute.

From at least 1943 until 1971, the judiciary had consistently followed the policy of permitting, nay requiring, FLSA claims to be determined by arbitration where the collective bargaining agreement contained such a clause. It was not until the case of *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351, 91 S.Ct. 409 (1971), that this Court departed from the established line of decisions in mid-stream and in a sharply divided opinion, concluded that the Labor Management Relations Act did not require arbitration of wage claims but was merely an alternative method.

The respondent submits to the Court that the *U.S. Bulk Carriers* decision was an unwise departure from the prior decisions of this Court. The dissenting opinion in *U.S. Bulk Carriers* more accurately analyzed the policy of encouraging settlement of labor disputes through the use of the grievance procedure in those instances when the claim of the employee is based on a federal wage statute.

As pointed out in the dissent in *U.S. Bulk Carriers, supra*, page 419:

> "The merits of respondent's nonstatutory claims depend entirely on interpretation and application of the bargaining agreement. Specifically, the threshold questions involved are (a) whether the respondent performed overtime work with the authorization of the master; (b) whether the crew was confined to ship because of the actions of government officials . . . and (c) whether the ship had arrived "inport" . . .
>
> "Most importantly, for purposes of this case, it is clear that the question of whether respondent was entitled to the statutory penalty depends entirely on a resolution of these questions. If it develops that petitioner had paid respondent all wages due him in a timely manner, the statutory penalty claim also disappears.
>
> "These questions are particularly within the competence of the contractually established grievance procedure of the collective-bargaining agreement. They are all questions of fact or interpretation of various provisions of the agreement. There is not the slightest indication or contention that the grievance machinery would be unable to determine these questions, or that it would be inferior to a federal court in so doing. It is clear from the face of the claims that a familiarity with the customs and practices of shipping would be distinctly helpful

in assessing the validity of the claims. This familiarity is, of course, one of the prime attributes of an arbitrator."

Further, at page 421 of the dissent:

"Nor until now has there been any principle that requires contract rights to be resolved internally but directs statutorily created remedies to be presented to the court, at least where, as here, the availability of the statutory remedy rests on disputed issues that are cognizable under the arbitration clause."

And at page 422:

"The effect of this is to hold contractual remedies enforceable by the employee but not by the employer. This is not only a curious application of §301 and contract principles but an unwise departure from past cases. In *Republic Steel Corp.* v. *Maddox, supra*, the Court foresaw that under such circumstances the employer, "to limit the modes of redress that could be used against him," would simply insist in future bargaining that suits for overtime pay be eliminated from the grievance procedure."

Further at page 422:

"Nothing in the words of the statute warrants dispensing with contractual procedures. Section 596 provides that the penalty "shall be recoverable *as wages* in any claim made before the court." (Emphasis added.) The statute on its face makes the penalty a wage claim; it would in no way be in derogation of the statute to require this claim to be presented like any other wage claim. Under the principles of *Republic Steel Corp.* v. *Maddox, supra*, this means that the internal remedies must first be exhausted.

"Even assuming without conceding that §596 provides a direct route to federal courts on penalty

> claims, §301 should at least require that the contractual bases for the penalty claim be settled by contractual methods before penalty claims may be adjudicated by the courts."

The Court should return to the principles of *Republic Steel Corp.* v. *Maddox* and put to rest once and for all the uncertainty which has resulted from *U.S. Bulk Carriers, Inc.*

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1974) does not conflict with or represent a departure by the Court from any of the theories or doctrines set forth above. *Alexander* is no more or less than a determination by this Court of the relative weight in the social structure of the country to be given the strong federal policy favoring arbitration of labor disputes and the (as was ultimately determined) even stronger federal policy of judicial examination of race discrimination. There is no "law of the shop" to aid an arbitrator or upon which an arbitrator could base a decision concerning race discrimination. The determination of what conduct is or is not discriminatory is not and never has been dealt with on a contractual basis. Although all employees and their union representatives can safely be assumed to be militantly interested in the protection of wages and hours, no such assumption can be made with respect to protection from racial discrimination. Indeed, the unions themselves have fostered race discrimination in the past. There is just no rational basis for attempting to equate a claim of race discrimination with a claim for nonpayment of wages. The reason for the Congressional policy favoring settlement by arbitration was to promote industrial peace. That policy was not intended to be used to protect the civil rights of individuals. The two pro-

blems being different, it is rational to use different solutions. As this Court points out in *Alexander, supra*, page 1023:

"The purpose and procedures of Title VII indicate that

> Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal."

But in the case of *Employees of Department of Public Health and Welfare* v. *Missouri*, 411 U.S. 279, 93 S.Ct. 1614, this Court held that there is no such congressional intent in the case of contract disputes which are based on FLSA requirements.

The approach of the 10th Circuit Court of Appeals in *Satterwhite* v. *United Postal Service, Inc.* 496 F.2d 448 (10th Cir. 1974), *cert. denied*, 419 U.S. 1079 (1975) represents a return to the rational policy of "comprehensive uniformity" described in *Maddox, supra* and should be adopted by this Court. *Satterwhite, supra*, page 450, correctly analyzes the relationship of the federal wage statutes and the antiracial discrimination statutes in light of the policies of the United States favoring arbitration of labor disputes:

> "The acceptance of the Court's analysis and reasoning in Gardner-Denver does not solve our problem unless we equate the wages and hours provisions of FLSA with the antidiscrimination provisions of Title VII. Strong national policy is expressed both in Title VII, 94 S.Ct. at 1019, and in FLSA, see 29 U.S.C. §202, and *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 706-707, 65 S.Ct. 895, 89 L.Ed. 1296. These policies, each in its turn, should be balanced against the federal policy favoring arbitration of labor disputes.

"In a number of respects FLSA is importantly different from Title VII. Gardner-Denver refers to the significant role of private individuals in the enforcement of Title VII rights . . . . In *Empolyees etc.* v. *Department of Public Helath and Welfare of Missouri*, 411 U.S. 279, 286, 93 S.Ct. 1614, 1618, 36 L.Ed.2d 251, the Court said that, "* * * private enforcement of the (FLSA) was not a paramount objective * * *." The independent statutory remedies in Title VII evince an intent to accord parallel or overlapping relief apart from contractual processes. The absence of such procedures in FLSA suggests a greater reliance on contract remedies and a lesser emphasis on individual enforcement.

". . . It established the defense of good faith reliance on administrative regulations . . . and declared the congressional policy "to protect the right of collective bargaining and * * * limit the jurisdiction of the courts." . . . The point is that in certain circumstances good faith is a defense to an FLSA action. The defense, however, is not available in Title VII actions.. . . The Portal-to-Portal Act speaks to the protection of collective bargaining. Gardner-Denver says that . . . "Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements." The different approach to the defense of good faith and the different emphasis on collective bargaining indicates that Congress intended that wage disputes and racial disputes should not receive the same treatment."

And further at page 451:

"Wages and hours are at the heart of the collective-bargaining process. They are more akin to collective rights than to individual rights, and are more suitable to the arbitral process than Title VII rights. *Gardner-Denver* says, 94 S.Ct. at 1024, that

> "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land," and that "judicial construction has proven especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." We are concerned with rate of pay, an issue which does not require, or lend itself to, public law considerations. The added fear expressed in *Gardner-Denver* that harmony between a union and an individual cannot be presumed "where a claim of racial discrimination is made," 94 S.Ct. at 1024 n. 19, has no pertinence here. One of the highest objectives of any union is to get all the money possible for all of its members."

And further at page 451:

> "The ever-present disputes over wages and hours are readily adaptable to arbitration. Resort to judicial process after arbitration prolongs the controversy and serves no good purpose when the arbitral and judicial proceedings arise out of, and must be decided on, the same factual background."

The *Satterwhite, supra*, decision has been favorably received by the judiciary beginning with the District Court of Puerto Rico in *International Longshoreman's Association* v. *Sea Land Services*, 430 F. Supp. 282 (F.R. 1975), where the District Court required an employee seeking overtime to first pursue his arbitration remedies. In relying on *Republic Steel, supra*, and *Satterwhite, supra,* that Court held:

> "It has no jurisdiction over matters that are arbitral under collective bargaining agreement . . ." *Id.* at 284.

Plaintiff's cause of action was dismissed.

In *Union de Tronquistos de Puerto Rico, Local 901* v. *Flagship Hotel, Corp.*, 554 F.2d 8 (1st Cir. 1977), the First Circuit interpreted a minimum wage regulation of Puerto Rico, which the Court assumed for the purpose of its decision, was compatible with the purposes of federal labor law, *Id.* at pages 10-11. The employees in *Union de Tronquistos* had submitted their claim to the arbitration process but being dissatisfied with the result filed suit in federal court. After an analysis and comparison of the rationale of *Alexander* v. *Gardner Denver* with *Satterwhite* v. *United Postal Service, Inc.*, the Court stated that in its opinion:

> ". . . *Satterwhite* was correctly decided and is *a fortiori* controlling here." *Id.* at page 11.

And went on to hold that:

> "We are convinced that the policy of Congress, recognized by the Courts, favors the arbitration of disputes over wages and hours in accordance with a collective-bargaining agreement. The high priority which Congress has given to protection against racial discrimination has no application to a dispute over rate of pay. The reassertion in a judicial forum of the same wage claim determined in an appropriate arbitration hinders rather than promotes industrial peace, and should not be permitted." *Id.* at page 12.

See also *Atterburg* v. *Anchor Motor Freight, Inc.*, 425 F. Supp. 841 (D.N.J. 1977) wherein the District Court of New Jersey held that the submission of a dispute to arbitration pursuant to a collective bargaining contract, without protest until after the arbitrators' decision, constituted consent by the parties to abide by the final determination. Once in arbitration, the FLSA cause of action is foreclosed unless proof exists of the

union's breach of duty of representation or the employer's repudiation of the contract. *Id.* at 844.

The trial court in the instant case reviewed the grievance committee proceedings and found them to be fair:

> "If the Grievance Committee had been shown to have been influenced by fraud or impropriety, or if the Union had failed in its duty of fair representation to these employees, or if, perhaps, the decision was so clearly contrary to the language of the contract that some impropriety could be inferred, then the bar of finality attaching in this contract to the Grievance Committtee's decision could be voided. The Court finds that none of these requirements is met here." (Pet. App. 12a)

Contrary to the position taken by the United States in its brief as *Amicus Curiae* at page 19, note 11, the time in question is not compensable under the FLSA, regardless of the decision of the grievance committee.

In *Tennessee Coal Iron R.R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949, rehearing denied 322 U.S. 771, 64 S.Ct. 1257, 88 L.Ed. 1596 (1944), this Court established a three-pronged test for determining hours worked for FSLA purposes: (1) The activity must require physical exertion; (2) The exertion must be controlled by the employer; and (3) The exertion must be pursued necessarily and primarily for the benefit of the employer and his business. See *Tennessee Coal Iron R.R. Co.* v. *Muscoda Local No. 123, supra*, 321 U.S. at 703.

The requirement for and elements of the safety inspection are dictated by the requirements of the Federal Motor Carrier Safety Regulations, 49 C.F.R. §§390, *et. seq.*, promulgated by the U. S. Department of Transportation under the authority of the Interstate

Commerce Act, 49 U.S.C. §304. The requirement that the inspection be made by the driver, not the company, is set forth in 49 C.F.R. §§392.7 and 396.4 (1979). The Department of Transportation inspection was not controlled by the employer but was performed at the discretion of the employees as to time and manner. The items to be inspected were established by the Department of Transportation and not by the employer. Nothing was added to the inspection and only those items required by the Department of Transportation were checked by the drivers. As pointed out by the 8th Circuit in *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 615 F. 2d 1194 (1980) at page 1201, the inspection was not for the exclusive benefit of the employer as required by *Tennessee Coal, supra*, but rather:

> "After all, the policy is designed for the welfare of the drivers as well as for the benefit of employers and third party members of the traveling public."

In *Leone* v. *Mobil Oil Co.*, 523 F. 2d 1153 (D.C. Cir. 1975), that Court of Appeals had occasion to interpret and apply the *Tennessee Coal* doctrine in a case involving the application of the FSLA time spent by employees participating in OSHA inspections. In analyzing the three-pronged test, that Court said at page 1163:

> "In applying the *Tennesse Coal* test that the activity be controlled by the employer and primarily for his benefit, we find that employees accompanying an OSHA inspector fail to satisfy either requirement. It is true, as plaintiffs state, that furthering industrial safety benefits the employer. This benefit, however, does not require finding that the activity is *primarily* for the employer's benefit. Many activities which may increase employee effectiveness and thus benefit the employer and are not worktime activities under FLSA.. . ."

Thus, the employees' claim must fail under the doctrine of *Tennessee Coal, supra.*

Additionally, 29 U.S.C. §254, the Portal-to-Portal Pay Act provides that no employer shall be subject to any liability under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act on account of the failure of the employer to pay an employee the minimum wage or to pay an employee overtime compensation for any activities which are preliminary or postliminary to the principal activities of the employee, if same occurs on or after May 14, 1947. The principal activities of the petitioners consist of driving trucks loaded with freight in interstate commerce. Inspection of the vehicles driven by the plaintiffs are preliminary to such principal activities.

Article 50 of the Collective Bargaining Agreement in the instant case provides, *inter alia*:

> "All employees covered by this agreement shall be paid for all time spent in the service of the employer."

This requirement for payment is even more broad than the requirement of 29 U.S.C. §206(b). The threshold determination by the grievance committee which had to be made was whether or not the time involved in performing the D.O.T. safety check was spent in the service of the employer. That decision required the specialized knowledge, expertise and familiarity with the law of the shop possessed so uniquely by arbitrators. Having determined that the time was not spent in the service of the employer, not only did the contractual claim under Article 50 fail, but the underpinning for the statutory claim was removed as well.

In order for the time to be compensable under the FLSA, the three-pronged test of *Muscoda, supra*, had to be met. Once the factual issue as to the nature of the time was resolved by the finding that it was not spent in the service of the employer, the doctrine of *Muscoda, supra*, provides the basis for the termination of the legal claim under FLSA. Implicitly, this is the holding of the *Satterwhite, supra*, Court at page 452:

> "We hold that when a wage dispute is submitted to arbitration in accordance with a collective-bargaining agreement, the employees may not thereafter maintain an FLSA §16(b) suit for recovery on the basis of the same factual occurrence as that presented to the arbitrator. We are convinced that the policy of Congress, recognized by the Courts, favors the arbitration of disputes over wages and hours in accordance with a collective-bargaining agreement."

B. The FLSA Claim Of The Employees Is Barred And Is Not Properly Before The Court Because Of The Failure Of The Employees To Comply With The Requirements Of The 29 U.S.C. §216(b) and 29 U.S.C. §256.

None of the employees signed the complaint and none of the employees signed a written consent as required. The employer raised this defect in its answer (J.A.3) and has consistently raised the issue throughout these proceedings. 29 U.S.C. §216(b) provides, *inter alia*:

> "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."

29 U.S.C. §256 requires that for any action commenced on or after May 14, 1947 under the Fair Labor Standards Act of 1938, as amended, that the action shall not be considered to be commenced as to a collective action until:

> "(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or
>
> "(b) if such written consent was not so filed or if his name did not so appear — on the subsequent date on which such written consent is filed in the court in which the action was commenced."

The case of *Burrell* v. *LaFollette Coach Lines*, 97 F. Supp. 279 (1951) was an action under the FLSA to recover unpaid minimum wages. The complaint named 32 individuals as plaintiffs; however, only one of the named plaintiffs signed the complaint. The 31 other plaintiffs did not sign the complaint and did not file separate written consents to become parties to the action. Although initially the plaintiffs sought relief on behalf of all others similarly situated, the attempt to make the action a class action was abandoned prior to trial and the matter proceeded limited to the 32 named parties. The trial court held that the action was a "collective action" for the purposes of 29 U.S.C. §256 and that the filing of the complaint was not a sufficient commencement of the action to stop the running of the statute of limitations as to the 31 plaintiffs who did not sign the complaint or file separate written consents. Accordingly, the action was dismissed as to the 31 named plaintiffs and only the single plaintiff who executed the complaint was permitted to proceed.

In *LaChapelle* v. *Owens, Illinois*, 513 F. 2d 286, 288 (5th Cir. 1975), that Court of Appeals contrasted 29 U.S.C. §216(b) with a class action under Fed. Rules of Civ. Proc. Rule 23 as follows:

> "Under §16(b) of FLSA, on the other hand, no person can become a party plaintiff and no person will be bound by or may benefit from judgment unless he has affirmatively "opted into" the class; that is, given his written, filed consent. *Sims* v. *Parke Davis & Co.*, 334 F.Supp. 774, 780-81 (E.D.Mich.) aff'd 453 F.2d 1259 (6th Cir. 1971) cert. denied 405 U.S. 978, 92 S.Ct. 1196, 31 L.Ed.2d 254 (1972).. . ."

In *Grosheck* v. *Babcock and Wilcox Tublar Products Div.*, 425 F. Supp. 232 (1977), an action under 29 U.S.C. §216(b) of the FLSA, a single plaintiff filed suit, executed a complaint and filed his written consent to the action. More than three years after the filing of the suit (and after the statute of limitations had expired), 119 additional employees tried to join the action by filing their written consents. The Court held that 29 U.S.C. §256 required the written consent to be filed within two (2) years of the accrual of the cause of action in order for the action to be considered as commenced. Since the additional plaintiffs had not filed their written consents within two (2) years of the accrual of the class action, the Court held the claims were barred and dismissed the 119. The trial court refused to permit the additional employees to join notwithstanding the effect of the refusal was to totally barr the claims of the other employees stating at page 233:

> "The 119 individuals who have filed written consents to the maintenance of this action did not submit their consents with the complaint. The only individual who has consented to the action . . . is the

> named plaintiff. Under §216(b), the named plaintiff, then, is the only plaintiff in this action . . ."

In *Sims, et al* v. *Parke Davis & Company*, 453 F. 2d 259 (6th Cir. 1971) cert. den. 405 U.S. 978 (1972), the 6th Circuit, in affirming the trial court's denial of the plaintiff's claims for minimum wage under the FLSA, adopted the reasons stated by the trial court in 334 F. Supp. 774, (1971):

> ". . . that the plaintiffs not filing written consents can neither benefit from nor be bound by any judgment . . ." *Id.* at 781.

See also *Kulik* v. *Superior Pipe Specialties Co.*, 203 F. Supp. 938 (Ed.Ill. 1962), an FLSA case in which the plaintiffs attached a typed document listing the persons who purportedly had consented to the action. The typed list lacked the individuals' actual signatures. Although the plaintiffs subsequently filed written consents, the Court refused to permit the written consents to relate back to the date the complaint was filed. In dismissing those claims the Court held "no document with the name of a person thereon satisfies the requirement of 29 U.S.C. §256, unless the typewritten name is proved to be the signature of and by that person." *Id.* at 941.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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December 19, 1980

No. 79-2006

IN THE

Supreme Court of the United States

October Term, 1979

LLOYD BARRENTINE, CLYDE G. EDWARDS, CLEO KEENEY, MAXIE BLANTON, JOHNNY ROBINSON, CHARLEY DEATON, H.E. MITTCHELL, AND L.R. YOUNG,
Petitioners,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN, LOCAL 878, AND A.J. PICKERING, PRESIDENT,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

Cases — Page

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 4

Amalgamated Association of Street, Electric Ry. and Motor Coach Employees v. Pennsylvania Greyhound Lines, Inc.,
192 F.2d 310 (3rd Cir. 1951) 2

Beckley v. Teyssier,
332 F.2d 495 (9th Cir. 1964) 3

Burrell v. LaFollette Coach Lines,
97 F.Supp. 279 (E.D. Tenn. 1951) 3

Donahue v. Susquehanna Collieries Co.,
138 F.2d 3 (3rd Cir. 1943) 1, 2, 3

Evans v. Hudson Coal Corp.,
165 F.2d 970 (3rd Cir. 1948) 1, 2, 3

Gatliff Coal Co. v. Cox,
142 F.2d 876 (6th Cir. 1944) 2

Gray v. Swanney-McDonald, Inc.,
436 F.2d 652 (9th Cir.), *cert. denied*, 402 U.S. 995 (1971) 3, 4

International Union, United Furniture Workers v. Colonial Hardwood Flooring Co.,
168 F.2d 33 (4th Cir. 1948) 2

Leyva v. Certified Grocers of California, Ltd.,
593 F.2d 857 (9th Cir. 1979) 3

Lincoln Mills v. Textile Workers Union,
230 F.2d 81 (5th Cir. 1956), *rev'd on other grounds*, 353 U.S. 448 (1957) 2

Mercury Oil Refining Co. v. Oil Workers International Union,
187 F.2d 980 (10th Cir. 1951) 2

Morelock v. NCR Corp.,
586 F.2d 1096 (6th Cir. 1978) 3

Pennsylvania Greyhound Lines, Inc. v. Amalgamated Association of Street, Electric Ry. and Motor Coach Employees,
193 F.2d 327 (3rd Cir. 1952) 3

United Electrical, R. & M. Workers v. Miller Metal Products,
215 F.2d 221 (4th Cir. 1954) 2

Statutes:

Arbitration Act

9 U.S.C. § 1, *et seq.* 1

Fair Labor Standards Act

29 U.S.C. § 216(b) 3

29 U.S.C. § 256 3

Other Authorities:

H.R. Rep. No. 326, 80th Cong., 1st Sess.
13 (1947) 3

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REPLY BRIEF FOR PETITIONERS

In its brief, respondent Arkansas-Best Freight System, Inc. ("ABF"), raises three arguments to which this brief responds.

1. Respondent's heavy reliance on the decisions of the Court of Appeals for the Third Circuit in *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3 (1943), and *Evans v. Hudson Coal Corp.*, 165 F.2d 970 (1948), is misplaced. To begin with, both cases held only that under the Arbitration Act, 9 U.S.C. § 1 *et seq.*, federal courts were required to stay proceedings pending referral of the underlying dispute to arbitration. Neither decision even hinted that once the arbitral process is complete, federal courts are foreclosed from examining the arbitration award to ensure

that it does not sanction the diminution of rights conferred by the FLSA. Indeed, in *Hudson Coal*, the Third Circuit cautioned that "if the arbitration process proceeds to an award which is not in accordance with the provisions of the Fair Labor Standards Act or any other applicable statute, Sections 10 and 11 of the Arbitration Act provide means for its vacation, rehearing, modification, or correction. The court below will be open for those ends." 165 F.2d at 974. Here, there already has been full recourse to the arbitral process. Even ABF concedes that petitioner Barrentine has fully pursued at least five grievances (App. 16). Accordingly, *Hudson Coal* and *Susquehanna Collieries* in no way support ABF's position.

Second, the authority of *Hudson Coal* and *Susquehanna Collieries* has long been clouded. The Third Circuit's view was not followed by any other circuit and expressly rejected by at least four circuits. *Gatliff Coal Co. v. Cox*, 141 F.2d 876, 882 (6th Cir. 1944); *International Union, United Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F.2d 33, 37-38 (4th Cir. 1948); *United Electrical R.&M. Workers v. Miller Metal Products*, 215 F.2d 221, 223-224 (4th Cir. 1954); *Mercury Oil Refining Co. v. Oil Workers International Union*, 187 F.2d 980, 983 (10th Cir. 1951); *Lincoln Mills v. Textile Workers Union*, 230 F.2d 81, 83-86 (5th Cir. 1956), *rev'd on other grounds*, 353 U.S. 448 (1957). Thus, contrary to ABF's assertions, the Third Circuit's was never the prevailing view.

Third, ABF glosses over the fact that even the Third Circuit later expressly rejected its construction of the Arbitration Act in *Hudson Coal* as "inconsistent with the intent of Congress." *Amalgamated Association of Street, Electric Ry. and Motor Coach Employees v. Pennsylvania Greyhound Lines, Inc.*, 192 F.2d 310, 311 (3rd Cir. 1951); *accord, Pennsylvania Greyhound Lines, Inc. v.*

Amalgamated Association of Street, Electric Ry. and Motor Coach Employees, 193 F.2d 327, 328 (3rd Cir. 1952). Accordingly, *Hudson Coal* and *Susquehanna Collieries* provide no support for respondent's position.[1]

2. Respondent also argues that petitioners' FLSA claims are barred because they did not file written consents authorizing suit, which ABF claims are required by 29 U.S.C. § 216(b) (Br. 21-25). This contention, however, rests on a serious misreading of the FLSA. In the first place, the filing of consents is not a jurisdictional requirement. Rather, filing serves only to stop the running of the statute of limitations in "collective or class actions." 29 U.S.C. § 256. While the complaint in this action initially sought relief on behalf of the named plaintiffs and others "similarly situated" (App. 3), the trial court dismissed the class claims prior to trial (Pet. App. 15a n.1). Thus, since this action was tried only on behalf of the named plaintiffs and was not a "collective or class" action, the filing of consents was unnecessary.

The case law is in accord with this reading of the Act. The two courts of appeals to address this issue have both concluded that where, as here, a case is maintained as one brought on behalf of named individuals, consents are not required. *Morelock v. NCR Corp.*, 586 F.2d 1096, 1103 (6th Cir. 1978); *Gray v. Swanney-McDonald, Inc.*, 436 F.2d 652, 655 (9th Cir.), *cert. denied*, 402 U.S. 995 (1971); *see* H.R. Rep. No. 326, 80th Cong., 1st Sess. 13 (1947). *But see Burrell v. LaFollette Coach Lines*, 97 F. Supp. 279 (E.D. Tenn. 1951).

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[1] *Beckley v. Teyssier*, F.2d 495 (9th Cir. 1964), also relied on heavily by ABF (Br. 7-8), has similarly been discredited. *See Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 862 (9th Cir. 1979).

Even if petitioners were required to file consents, however, ABF's claim would still fail. Each petitioner personally signed at least two sets of answers to interrogatories (*e.g.*, App. 34-41), and the signing of answers to interrogatories has been held to satisfy the consent requirement. *Gray v. Swanney-McDonald, Inc., supra,* 436 F.2d at 655. Accordingly, respondent's consent argument is without force and should be rejected.

3. Respondent further asserts that petitioners actually did submit their FLSA claims to the joint grievance committee (Br. at 1-2). As discussed in petitioners' opening brief, pp. 27-29, it is immaterial whether the FLSA claims were in fact submitted to the grievance committee. This Court emphasized in *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974), that where statutory rights are implicated, courts should not defer to grievance decisions but must instead examine such claims on the merits, even if the arbitrator purported to decide the statutory claim. The Court admonished that "courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discrimination claims. It is the duty of the courts to assure the full availability of this forum." 415 U.S. at 60 n.21. These final cautionary words are, of course, equally applicable to FLSA claims for which Congress also thought it necessary to provide a judicial forum for resolution.

Moreover, the facts of this case do not support ABF's assertion. Neither court below found that petitioners' FLSA claims had been presented to the grievance committee, let alone that the committee had actually considered such claims. Neither the grievances submitted to the joint grievance committees nor the committees' reports make any mention of the FLSA, or indeed any other statute (App. 19-21; R. 43-54, 77-81, 95). The sole reference to

federal law in the entire record of the grievance proceedings was an assertion in one of the grievance filings (App. 16, 21) that "Federal Wage Laws also state that this is compensable time." No statute was cited as an independent basis for recovery, and no mention of federal wage law is made by the grievance committee in its disposition of any of the grievances. As is evident, this isolated reference can hardly be construed as a "submission" of the FLSA claim to arbitration, particularly since it was not Mr. Barrentine, but his union, which processed the grievances. Thus, as Judge Heaney concluded in his dissent, "there was no intent to submit the FLSA claim to arbitration and it was not submitted to arbitration." (Pet. App. 31a).

CONCLUSION

For the reasons stated above and in petitioners' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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OCTOBER TERM, 1980

LLOYD BARRENTINE, et al.,

Petitioners,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC. et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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TABLE OF CONTENTS

MOTION:

	Page
In Interest Of The Amicus Curiae	i
Issues To Be Covered In The Brief Amicus Curiae	ii
Conclusion	iii

BRIEF:

Introduction And Summary Of Argument	1
Argument	5
I. The Basic NLRA Principles	5
II. The Principles Governing This Case	14
III. The Principles Governing the Arbitration of NLRA Rights	25
Conclusion	29

TABLE OF AUTHORITIES

CASES:

Aeronautical Lodge v. *Campbell*, 337 U.S. 521	19
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36	2, 3, 21-22, 24, 25
American Steel Foundries v. *Tri-City Central Trades Council*, 257 U.S. 184	5
Auto Workers v. *Hoosier Cardinal Corp.*, 383 U.S. 696	12
Boys Markets v. *Clerks Union*, 398 U.S. 235	20
Bus Employees v. *Wisconsin Board*, 340 U.S. 383	7
California Brewers Assn. v. *Bryant*, 444 U.S. 598	18
Carbon Fuel v. *Mine Workers*, 444 U.S. 212	16
Carey v. *Westinghouse Corp.*, 375 U.S. 261	2, 3, 25
Collyer Insulated Wire, 192 NLRB 837	28, 29
Drivers Local Union v. *Riss & Co.*, 372 U.S. 517	13, 15
Emporium Capwell Co. v. *Community Org.*, 420 U.S. 50	8-9

Page

General American Transportation Corp., 228 NLRB 808 28
Howard Johnson Co. v. *Hotel Employees*, 417 U.S. 249 16
Hines v. *Anchor Motor Freight*, 424 U.S. 554 ..... 12, 13-14, 17
Humphrey v. *Moore*, 375 U.S. 335 14
International Harvester Co., 138 NLRB 923 26
J. I. Case Co. v. *Labor Board*, 321 U.S. 332 9-11
Labor Board v. *American Nat. Inc. Co.*, 343 U.S. 395 7
Labor Board v. *Insurance Agents*, 361 U.S. 477 7
Labor Board v. *Jones & Laughlin Corp.*, 301 U.S. 1 6
Labor Board v. *Sands Mfg. Co.*, 306 U.S. 332 26
Mastro Plastics v. *Labor Board*, 350 U.S. 270 27
NLRB v. *Burns Security Services*, 406 U.S. 272 29
NLRB v. *Magnavox*, 415 U.S. 322 27
Nolde Bros., Inc. v. *Bakery Workers*, 430 U.S. 243 13
Porter Co. v. *NLRB*, 397 U.S. 99 6
Raley's Inc., 143 NLRB 256 26
Republic Steel Corporation v. *Maddox*, 379 U.S. 650 ..... 14, 20
Retail Clerks v. *Lion Dry Goods*, 369 U.S. 17 12
Roy Robinson Chevrolet, 228 NLRB 828 28
Smith v. *Evening News Assn.*, 371 U.S. 195 12
Spielberg Mfg. Co., 112 NLRB 1080 25
Steele v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192 17
Steelworkers v. *Enterprise Mfg. Co.*, 363 U.S. 593 ..... 13, 22, 24
Steelworkers v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 ..... 13, 20

Page

Steelworkers v. *Weber*, 443 U.S. 193 18
Steiner v. *Mitchell*, 350 U.S. 247 22
Textile Workers v. *Lincoln Mills*, 353 U.S. 448 12
The Fair v. *Kohler Die & Specialty Co.*, 228 U.S. 22 29
U.S. Bulk Carriers, Inc. v. *Arguelles*, 400 U.S. 351 .... 8, 22
Vaca v. *Sipes*, 386 U.S. 171 14
Westinghouse Employees v. *Westinghouse Corp.*, 348 U.S. 437 12
William E. Arnold Co. v. *Carpenters*, 417 U.S. 12 28

STATUTES:

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, et seq. 8
Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e 2, 4, 22, 23
§ 703(h), 42 U.S.C. § 2000e-2(h) 151
Davis-Bacon Act of 1931, 49 Stat. 1001, 40 U.S.C. § 276a, et seq. 8
Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 et seq.
Section 7(b)(1), 29 U.S.C. § 207(b)(1) 18
Section 7(b)(2), 29 U.S.C. § 207(b)(2) 18
Section 7(a), 29 U.S.C. § 207(a) 18
Labor-Management Relations Act of 1947
Section 101, amending the National Labor Relations Act, 29 U.S.C. § 151, et seq. 6, 7
Section 301 29 U.S.C. § 185 ..... 2, 12, 15, 16
Section 203(d), 29 U.S.C. § 173(d) 12, 15, 16, 20
National Labor Relations Act, 28 U.S.C. § 151 et seq.
Section 1 6
Section 7 ..... 5, 6, 9, 26, 27

Page

Section 8(a)(1) 26
Section 8(a)(3) 9
Section 8(d) 7, 16, 20, 29
Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101, et seq. 8, 21
Section 3, 29 U.S.C. § 103 8
46 U.S.C. §§ 596-597 derived from Act of July 1970, Ch. 29, § 6, 1 Stat. 133 8

MISCELLANEOUS:

Brief of the National Labor Relations Board in *J. I. Case Co.* v. *Labor Board*, No. 67, October Term 1943 11
Feller, *Arbitration: The Days of Its Glory Are Numbered*, 2 Industrial Relat. L.J. 97 (1977) 7
Tentative Draft No. 4 of the Restatement of Judgments (American Law Institute) 23

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the petitioners in this case.

INTEREST OF THE AFL-CIO

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 104 national and international labor organizations representing approximately 13,500,000 employees throughout the United States. This case concerns the scope and function of grievance arbitration systems established through collective bargaining. Thus, the question presented is at the core of the

labor movement's concerns. It is for that reason that the AFL-CIO seeks this opportunity to present its views to the Court.

ISSUES TO BE COVERED IN THE BRIEF AMICUS CURIAE

The petition for certiorari and brief of the United States in support thereof rest their argument for reversal largely on this court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, which held that an individual's claim under Title VII of the Civil Rights Act of 1964 is not barred by his failure to exhaust the procedures provided under contractual grievance procedures, or even by an adverse award thereunder. Petitioners and the United States point out substantial parallels between the statutory scheme under Title VII and under the Fair Labor Standards Act which, they urge, require the same result in this case. And, much of what we will say below is, indeed, anticipated by this Court's unanimous opinion in that case.

We submit the attached brief, however, because we believe that it is essential to do business not only with *Alexander* but also with this Court's decision in *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, which approved deferral by the NLRB to the awards of arbitral tribunals, and because we also believe that a sounder approach to the problem exemplified by *Carey, Alexander* and the present case is one based on general principle, rather than on *ad hoc* evaluation of the particular statute on which the individual's claim is based.

We believe that such a general approach not only avoids unnecessary litigation, but furthers both the objectives of Congress in enacting such protective legislation and in encouraging the private resolution of contractual disputes.

The court below certainly thought that it was furthering the arbitral process by its decision. Thus the last of these points may appear paradoxical. But we submit, for the reasons we state that the contractual grievance process is overburdened and jeopardized by imposing on it functions extrinsic to its nature and purpose.

In a word, our basic thesis is that these procedures are designed to resolve disputes over rights which have their *source* in collective bargaining agreements, and are not charged with vindicating and do not provide a substitute for the rights which Congress has by statute granted to individual employees. That thesis is qualified, as we shall develop, by the caveat that some federal legislation while protective of the rights of individual employees is subject to the fundamental policy of free collective bargaining and to that extent permits or indeed encourages an accommodation of such individual statutory rights to the fruits of the collective bargaining process of which the entire grievance machinery is an important component. We submit that our thesis with the stated limitations not only resolves any tension between *Alexander* and *Carey,* but, more importantly, effectuates the national labor policy as an entirety.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

The holding of the Court below—that petitioners' claims for minimum wages under the Fair Labor Standards Act are barred by an adverse determination by the tribunal established under the collective bargaining agreement for deciding grievance disputes arising under that agreement—

rests on the importance that national labor policy places on the voluntary adjustment by the parties of contractual disputes. We agree that this Court's decisions properly leave no room for doubt that this is indeed an important element of the national labor policy, which the courts, in exercising their responsibilities under the Labor-Management Relations Act, are required to respect and implement. We are nevertheless constrained to disagree with the decision of the Court of Appeals and to urge its reversal.

The petition for certiorari, and the brief of the United States in support thereof rest their argument for reversal largely on this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, which held that an individual's claim under Title VII of the Civil Rights Act of 1964 is not barred by his failure to exhaust the procedures provided under contractual grievance procedures, or even by an adverse award thereunder. Petitioners and the United States point out substantial parallels between the statutory scheme under Title VII and under the FLSA which, they urge, require the same result in this case. And, much of what we will say below is, indeed, anticipated by this Court's unanimous opinion in that case.

We submit this brief, however, because we believe that it is essential to do business not only with *Alexander* but also with this Court's decision in *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, which approved deferral by the NLRB to the awards of arbitral tribunals, and because we also believe that a sounder approach to the problem exemplified by *Carey, Alexander* and the present case is one based on general principle, rather than on *ad hoc* evaluation of the particular statute on which the individual's claim is based.

We believe that such a general approach not only avoids

unnecessary litigation, but furthers both the objectives of Congress in enacting such protective legislation and in encouraging the private resolution of contractual disputes. The court below certainly thought that it was furthering the arbitral process by its decision. Thus the last of these points may appear paradoxical. But we submit, for reasons to be stated, that the contractual grievance process is overburdened and jeopardized by imposing on it functions extrinsic to its nature and purpose.

In a word, our basic thesis is that these procedures are designed to resolve disputes over rights which have their *source* in collective bargaining agreements, and are not charged with vindicating and do not provide a substitute for the rights which Congress has by statute granted to individual employees. That thesis is qualified, as we shall develop, by the caveat that some federal legislation while protective of the rights of individual employees is subject to the fundamental policy of free collective bargaining and to that extent permits or indeed encourages an accommodation of such individual statutory rights to the fruits of the collective bargaining process of which the entire grievance machinery is an important component. We submit that our thesis with the stated limitations not only resolves any tension between *Alexander* and *Carey,* but, more importantly, effectuates the national labor policy as an entirety.

In part I of our argument we trace the distinction between the two basic components of the national labor policy —on the one hand the rights of self-organization and of free collective bargaining stated in the NLRA and the LMRA, and, on the other the various minimum substantive rights protecting employees created in such legislation as

FLSA. We stress that employee rights achieved through the collective action provided for by the NLRA are the product of a system of majority rule and are subordinate to those of the majority. We note also the limitation on that proposition—that such contractually created individual rights are enforceable, and that enforcement through arbitration is favored.

Part II constitutes our effort to apply the basic principles just noted to the problem presented by the instant case. Our first major point is that the source of statutory rights is a decision by Congress as matter of public policy rather than the exercise of economic strength, which is the source of the rights under collective bargaining agreements. Thus, unless Congress has chosen to allow it, these public rights are not to be subordinated to private agreements. And it necessarily follows that statutory rights are to be vindicated according to the methods prescribed by Congress, and not according to the methods prescribed by private parties. Our second major point is that contractual grievance procedures are designed to resolve disputes concerning rights *created* by the contract; the reasons public policy favors this system, the considerations that cause the parties to choose it, and its functional strengths, have nothing to do with the enforcement of statutory rights.

Finally, in part III we turn to the question of why deference is paid to arbitrations concerning NLRA-created rights. We show that while the employee rights created by the FLSA, Title VII and kindred statutes are usually ends in themselves and are therefore not waivable, certain NLRA rights are viewed as means to the end of industrial self-government and therefore may be subordinated to the collective bargaining system as a whole, including the arbitration machinery.

ARGUMENT

I. The Basic NLRA Principles

1. The AFL-CIO firmly believes that the greatest and most fundamental protection of the economic standard of workers in general is the right of free collective bargaining through their chosen representative. For it is that right alone which addresses the very essence of the workers' economic condition *vis-a-vis* their employer. What Chief Justice Taft wrote in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209 remains as true now as it was then:

> [Labor organizations] * * * were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. * * * The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital.

Statutory protection of the employees' right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection," was provided by the National Labor Relations Act of 1935 ("NLRA"), and particularly § 7 thereof. In

sustaining the constitutionality of the NLRA, Mr. Chief Justice Hughes declared that right to be "fundamental" and recalled what his predecessor had written a generation earlier concerning the reason for labor organizations. *Labor Board* v. *Jones & Laughlin Corp.*, 301 U.S. 1, 33. For, the same understanding of the role and necessity of free collective bargaining was embodied in the Congressional "findings and policies" declared in § 1 of that Act.

As Mr. Justice Black wrote in *Porter Co.* v. *NLRB*, 397 U.S. 99, 103:

> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.

Although the Labor Management Relations Act of 1947 ("LMRA") amended the NLRA (including §§ 1 & 7) in some respects, the protection of the right of employees to bargain collectively through representatives of their own choosing has remained at the heart of the national labor policy. Indeed, Senator Robert A. Taft, the chief sponsor of the 1947 amendments, which were, on the whole, adverse to organized labor, stressed the importance of free collective bargaining (including the right to strike over terms

and conditions of employment) as essential for the maintenance of a free economy.[1] And the 1947 Amendments added § 8(d) of the Act in order to make it "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *Labor Board* v. *American Nat. Ins. Co.*, 343 U.S. 395, 404. See also *Labor Board* v. *Insurance Agents*, 361 U.S. 477, 487; *Porter Co.*, *supra*, 397 U.S. at 105-106.

2. However, the national labor policy has not left the protection of workers exclusively to what they can achieve through collective bargaining. The Fair Labor Standards Act of 1938, under which the present case arises, and various veterans' preference laws are among the growing number of statutes which have established norms binding on all employers (and in some instances on labor organizations as well) with respect to terms and conditions of employment (including the decision regarding the selection of employees). As one commentator has observed:

> [W]ithin a few years [after 1960] there began an ever increasing quantity of substantive federal regulation of the terms and conditions of employment * * *. In 1963, there was the Equal Pay Act; in 1964, Title VII of the Cviil Rights Act; in 1970, the Occupational Safety and Health Act and Title III of the Consumer Credit Protection Act limiting the right of an employer to discharge because of garnishment. In 1974, the Employee Retirement Income Security Act (ERISA) was passed ***.[2]

[1] See 93 Cong. Rec. 3835-3836 quoted as authoritative in *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 395, n. 21.

[2] Feller, *Arbitration: The Days of Its Glory Are Numbered*, 2 Industrial Relat. L.J. 97, 105 (1977) (footnotes omitted). This article will hereafter be cited as "Feller, *Arbitration.*"

To this list could be added, *inter alia*, the Age Discrimination Act of 1967, Title IX of the Education Amendments of 1972, and the various mine safety and health protection acts. Each of these statutes substantially affect the terms of collective agreements on mandatory subjects of bargaining by setting minimum standards of protection for individual employees which may not be breached.[3]

3. Individual workers thus obtain various protections and benefits from separate and distinct sources—private contract law and public law. Insofar as those rights are based on a collective bargaining agreement the rights of the individual are, as has been understood from the beginning, subordinated to those of the majority. As this Court reaffirmed in *Emporium Capwell Co.* v. *Community Org.*, 420 U.S. 50, 62:

[3] The great bulk of employee protective legislation postdates the enactment of the NLRA, in part because the clarification in constitutional doctrine that began with the *Jones & Laughlin* decision have made them possible. Cf. Mr. Justice Black's observation in *Porter, supra*, 397 U.S. at 104-105: "The Act was passed at a time in our Nation's history when there was considerable legal debate over the constitutionality of any law that required employers to conform their business behavior to any governmentally imposed standards." Nonetheless, some employee protective legislation was already in effect when the NLRA was adopted. *E.g.* 46 U.S.C. § 596-597, which was derived from the Act of July 20, 1790, (see *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351, 353-354, discussed at p. 22, n.16, *infra*); Davis-Bacon Act, 40 U.S.C., § 276a *et seq.*, originally adopted March 3, 1931. Although the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C., § 101, *et seq.*, principally regulates the jurisdiction of the federal courts, it contains some substantive provisions, including § 3, which declares unenforceable as against public policy any agreement whereby a party agrees not to join, become or remain a member of any labor organization or employer, or that he will withdraw from an employment relationship in the event that he does so. (29 U.S.C. § 103).

> Central to the policy of fostering collective bargaining where the employees elect that course, is the principle of majority rule. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). If the majority of a unit chooses union representation, the NLRA permits it to bargain with its employer to make union membership a condition of employment, thereby imposing its choice upon the minority. 29 U.S.C. §§ 157, 158(a)(3). In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority.*** As a result, "[t]he complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953).

In a footnote to this passage the Court observed:

> In introducing the bill that became the NLRA, Senator Wagner said of the provisions establishing majority rule: "Without them the phrase 'collective bargaining' is devoid of meaning, and the very few unfair employers are encouraged to divide their workers against themselves." 79 Cong. Rec. 2372 (1935). [420 U.S. at 62, n. 13]

One consequence is that the collective bargaining agreement extinguishes whatever rights the employee may have had under an individual contract with his employer. This result is logically inherent in the very concept of collective bargaining. The subject was most fully addressed in *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332, 337-339:

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking

to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. * * * Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility.

It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. * * *

[W]e find the mere possibility that [individual] agreements [containing] * * * better terms than those obtainable by the group * * * might be made no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. * * * They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole. Such discriminations not infrequently amount to unfair labor practices. The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will

generally in practice go in as a contribution to the collective result.[4]

---

[4] The loss of the right to enforce his individual employment contract will rarely, if ever, involve a genuine diminution in the employee's economic interest. For the economic reality which has led to worker organization and collective bargaining is that the individual employment contract is a "bargain" in only the loosest sense; the individual employee has no bargaining power whatsoever. See pp. 5-6 *supra*. As one observer wrote at the turn of the century:

> • • • The "individual bargain," or individual contract, between employers and men means that the condition of the worst and lowest man in the industry will be that which the best man must accept. From first to last, from beginning to end, always and everywhere, trade unionism stands unalterably opposed to the individual contract. There can be no concession or yielding upon this point. No monetary advantage, however great or however ardently desired, no advance in wages, no reduction in hours, no betterment in conditions, will permanently compensate workingmen for even a temporary surrender in any part of this fundamental principle. It is this principle, the absolute and complete prohibition of contracts between employers and individual men, upon which trade unionism is founded. There can be no permanent prosperity to the working classes, no real and lasting progress, no consecutive improvement in conditions, until the principle is firmly and fully established, that in industrial life, especially in enterprises on a large scale, the settlement of wages, hours of labor, and all conditions of work, must be made between employers and workingmen collectively and not between employers and workingmen individually. • • • [Mitchell, John, *Organized Labor*, Philadelphia (1903) pp. 3-4, reprinted at pp. 57-58 of the Brief of the National Labor Relations Board in *J. I. Case Co., supra*, No. 67, Oct. Term, 1943.]

See also the other "Statements of Economists and Experts in the Field of Labor Relations Respecting the Relationship of Individual Bargaining to Collective Bargaining" as set forth as Appendix B to that Brief, pp. 56-67.

4. Individual rights under a collective bargaining agreement, however, are enforceable. One of the major additions to the national labor policy effectuated by the 1947 amendments is § 301(a) of the LMRA which provides for the judicial enforcement of collective agreements.[5] *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448. And it is now established (after some earlier doubts [6]) that the rights of individuals under collective agreements may be judicially enforced by the individual himself, as well as by the bargaining agent. *Smith* v. *Evening News Assn.,* 371 U.S. 195; *Auto Workers* v. *Hoosier Cardinal Corp.,* 383 U.S. 696; *Hines* v. *Anchor Motor Freight,* 424 U.S. 554.

The enforcement of rights under collective agreements is the subject of an additional Congressional policy, which also became part of the law in 1947. Section 203(d) of the LMRA provides in pertinent part:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Congress thereby gave specific approval to the means which unions and employers had developed for private resolution of disputes concerning rights created by collective bargaining agreements.[7]

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[5] For completeness we note that § 301(a) extends to the enforcement of labor "contracts" and not only to collective bargaining agreements (*Retail Clerks* v. *Lion Dry Goods,* 369 U.S. 17).

[6] See the various opinions in *Westinghouse Employees* v. *Westinghouse Corp.,* 348 U.S. 437, and the reservation in *Lincoln Mills,* 353 U.S. at 459, n. 9.

[7] The legislative history set forth in *Lincoln Mills,* 353 U.S. at

The decisions of this Court have given broad and hospitable scope to this major component of the national labor policy. *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (hereafter "*Warrior & Gulf*"), while recognizing that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit * * *," held that:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." [*Id.* at 582-3.] [8]

And in a companion case in the familiar *Steelworkers* trilogy, *Steelworkers* v. *Enterprise Mfg. Co.*, 363 U.S. 593, the Court determined that the scope of judicial review of arbitration awards is very narrow. "The federal policy of settling labor disputes by arbitration would be undermined if courts had the finay say on the merits of the awards" (*id.* at 596). See also *Drivers Local Unions* v. *Riss & Co.*, 372 U.S. 517, 519.

As summarized in *Hines* v. *Anchor Motor Freight, supra,* the "Congressional policy" embodied in § 203(d)

> "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960). Courts are not to usurp those functions which

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452-457, shows that the enforcement of promises to arbitrate was also one of the important considerations underlying the enactment of § 301(a). See 353 U.S. at 452-457. See also *Warrior & Gulf, supra,* 363 U.S. at 577-578.

[8] See also, *e.g.*, *Nolde Bros., Inc.* v. *Bakery Workers,* 430 U.S. 243, 254-255.

> collective-bargaining contracts have properly "entrusted to the arbitration tribunal." *Id.*, at 569. They should not undertake to review the merits of arbitration awards but should defer to the tribunal chosen by the parties finally to settle their disputes. Otherwise "plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 599 (1960). [424 U.S. at 562-563.]

An important corollary to this policy, which directly affects the judicial enforcement by individuals of contractual rights has been established by this Court: An individual must attempt to exhaust the contractual grievance procedure prior to bringing suit under contract (*Republic Steel Corporation* v. *Maddox*, 379 U.S. 650) and his suit is also subject to the finality provisions of the agreement (*Humphrey* v. *Moore*, 375 U.S. 335; *Hines, supra*, 424 U.S. at 562-563). In both situations, this bar is removed and the individual may prosecute his suit under the contract against the employer if he can establish that the grievance procedure did not operate properly because of a breach of the duty of fair representation by the union, *e.g. Vaca* v. *Sipes*, 386 U.S. 171, 185-187; *Hines, supra* 424 U.S. at 567-572.

II. The Principles Governing This Case

In the present case the court below treated the award of the Joint Grievance Committee as a final and binding determination not only of petitioners' rights under the contract, but also of their rights under the FLSA. That court was clearly right in the holding (which is not challenged here) that the Joint Grievance Committee award was bind-

ing against petitioners of their contractual claim.[9] But we submit that the lower court erred in holding that the award also barred petitioners' claims under the FLSA. The difference in result is required for two reasons: First, an individual's rights under a collective bargaining agreement are fundamentally different from those which he is granted by statute; second, the national labor policy which is embodied in §§ 203(d) & 301, and which the Court has effectuated in cases such as the *Steelworkers* trilogy, is to promote the private adjustment of disputes concerning *contractual,* and not statutory rights.

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[9] The Court of Appeals adverted to criticism of the procedures of the Joint Grievance Committee because it is composed solely of an equal number of union and member representatives and contains no neutral tiebreaker. 615 F.2d 1195, 1201. As that court recognized, such objections were answered by this Court in *Drivers Local Union* v. *Riss, supra.*

> It is not enough that the word "arbitration" does not appear in the collective bargaining agreement, for we have held that the policy of the Labor Act "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564, 566, cf. *Retail Clerks etc.,* v. *Lion Dry Goods, Inc.,* 369 U.S. 17. Thus, if the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the Agreement, it is enforceable under § 301. And if the Joint Area Cartage Committee's award is thus enforceable, it is of course not open to the courts to reweigh the merits of the grievance. *American Mfg. Co., supra,* at 567-568 [372 U.S. at 519]

To this we add one additional comment. For the courts to impose their own views as to what is a more desirable method for resolving contractual disputes (as by insisting on a neutral tiebreaker) although there is no reference thereto in § 203(d) or § 301 (and none

1. As we developed at pp. 5 to 7, and 8 to 14, *supra*, Congress has adopted a national labor policy which encourages the practice and procedure of collective bargaining in recognition of the fact that the individual worker has no bargaining power.

The definition of the duty to bargain, § 8(d),[10] as well as the specific policy embodied in § 203(d), allows no doubt that the enforcement of rights stated in collective agreements is to be governed by the same majoritarian principle under which those rights were created. Since the terms and conditions which the individual enjoys under such agreements are the product of the collective strength of the group, and are not imposed on him by the employer's overriding economic strength, as is an individual employment contract, this policy rarely, if ever, leaves the employee in a worse position than he would have been absent collective bargaining. With one exception, cases in which individuals seek to enforce rights under collective bargaining agreements contrary to the decision of the representative, or of the tribunal established by the agreement for the resolution of contractual disputes, are cases in which the individual wishes to enjoy the benefits of representation and

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is present at earlier stages of the ordinary grievance procedure) would be to defeat the policy also of § 8(d) (see pp. 6-7 *supra*) which the courts must respect in suits under § 301. *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 254-256; *Carbon Fuel* v. *Mine Workers*, 444 U.S. 212, 218-219.

[10] "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to * * * the negotiation of an agreement, or any question arising thereunder, * * *."

the collective strength of the group, but wishes to avoid the inherent cost of every political system—that on occasion the individual's interests are subordinated to those of the group. That exception is covered by the right to fair representation as declared in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192, and most recently explained in *Hines, supra*:

> Because "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit," *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, "the responsibility and duty of fair representation." *Humphrey* v. *Moore, supra*, at 342. The union as the statutory representative of the employees is "subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor* v. *Huffman, supra*, at 338. [424 U.S. at 554]

As that statement shows, the distinction between contractual and statutory rights is sound also when the problem is viewed in terms of the functions and duties of the individual's representative, the union. The union's statutory authority—and the derivative duty of fair representation in the exercise of that authority—grow out of the collective bargaining system.

By contrast, an individual's statutory rights are not the product of the collective bargaining process, and are not the substitute for the individual contract of employment. Rather, they are rights granted the individual by Congress in order to effectuate some public policy; in this respect

they are no different from other statutory rights unrelated to employment.

Of course, Congress has power to allow these statutory rights to be modified or eliminated by private agreement. The Fair Labor Standards Act itself provides a pertinent example of its exercise of that power. Sections 7(b)(1) & (2)[11] permit the performance of work in excess of the maximum hours prescribed in § 7(a) without the payment of overtime compensation if the employee is so employed "in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board" (subject to certain limitations not pertinent here). In other instances, rights which have their origin in collective bargaining are given special legislative protection, as § 703(h) of the Civil Rights Act of 1964 illustrates.[12]

Moreover, a recent decision of this Court considering § 703(h) recognizes the broader point that in enacting employee legislation Congress does not act in a vacuum, but does so in the context of a national labor policy which encourages free collective bargaining. In *California Brewers Assn.* v. *Bryant*, 444 U.S. 598, 608, the Court said:

"* * * Congress passed the Civil Rights Act of 1964

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[11] 29 U.S.C. §§ 207(b)(1) & (2), added by §§ 6(a) & (b) of the Fair Labor Standards Amendments of 1961, Pub. Law 87-30, 75 Stat. 69.

[12] Indeed, Congress may determine to permit by agreement or other voluntary action certain conduct which would otherwise be unlawful. The issue which divided the Court in the celebrated case of *Steelworkers* v. *Weber*, 443 U.S. 193 was whether Congress had done so with respect to certain "private, voluntary, race-conscious affirmative plans." (*Id.* at 208.)

> against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally *Steelworkers* v. *Weber*, 443 U.S. 193. It does not behoove a court to second-guess either that process or its products. *Porter Co.* v. *NLRB*, 397 U.S. 99. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. See *Ford Motor Co.* v. *Huffman*, 345 U.S. 330; *Aeconautical Lodge* v. *Campbell*, 337 U.S. 521.[13]

Thus, the extent to which statutory rights are subject to waiver, or are to be construed in the light of collective bargaining practice is, like every other question of statutory interpretation, one of determining the legislative intent. And

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[13] In *Aeronautical Lodge* v. *Campbell*, which protected veterans' seniority rights, the Court had held:

> In providing that a veteran shall be restored to the position he had before he entered the military service "without loss of seniority," § 8 of the Act uses the term "seniority" without definition. It is thus apparent that Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining. We must therefore look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran.
>
> Barring legislation not here involved, seniority rights derive their scope and significance from union contracts, confined as they almost exclusively are to unionized industry. All these variations [in the use of the seniority principle] disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. [337 U.S. at 526.]

because the national labor policy is multifaceted, the decision often requires "consideration [of] the total corpus of pertinent law policies that inspired ostensibly inconsistent provisions" (*Boys Markets* v. *Clerks Union*, 398 U.S. 235, 250) instead of reading the statute which creates the right in isolation. But for present purposes the principal point is that the source of statutory rights is a decision by Congress as matter of public policy rather than the exercise of economic strength, which is the source of rights under collective bargaining agreements. Thus, unless Congress has chosen to allow it, these public rights are not to be subordinated to private agreements. And it necessarily follows that statutory rights are to be vindicated according to the methods prescribed by Congress, and not according to the methods prescribed by private parties.

2. The second, and, we believe, major reason why the vindication of statutory rights should not be subject to contractual grievance procedures is that that is not the function which those procedures are designed to perform. Rather, their purpose is to resolve disputes concerning rights which are *created* by the collective bargaining agreement. Section 203(d) endorses the method chosen by the parties "for settlement of grievance disputes arising *over the application or interpretation of an existing collective-bargaining agreement.*" (Emphasis added.) See also § 8(d) quoted at p. 16 n.10, *supra*. And as stated in *Warrior & Gulf*, *supra*: "* * * arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself" (363 U.S. at 578).

As Justice Harlan observed in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 656, the willingness of management to accept a provision by which it relinquishes absolute con-

trol over a particular term of employment may well depend on the exclusivity of the contractually established procedures for the resolution of disputes concerning that provision. And, the Court has frequently observed, using the *quid pro quo* rubric, unions are willing to give up the right to strike during the life of an agreement only on the condition that disputes during the life of the agreement are to be settled by arbitration.[14] These objectives are, however, quite irrelevant to the vindication of statutory rights.

Moreover, the reasons why parties to collective agreements so frequently prefer to commit their interpretation to a private system rather than to the courts do not explain or justify subjecting the enforcement of statutory rights to arbitration. We need not recapitulate those reasons, which have been spelled out in several opinions of this Court. The most obvious, however, which is the arbitrator's "expertise",[15] is plainly inapplicable to the interpretation of statutes, which is a basic function of the judiciary.

On the contrary, as this Court observed in *Alexander* v.

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[14] The agreement in the present case requires the parties to exhaust the grievance procedure prior to a strike or lockout, but reserves to them the right to engage in economic action in the event of an ultimate deadlock, or the other party's failure to comply with an award of the Joint Grievance Committee. (Joint App., pp. 24-26.)

[15] Such expertise is particularly great where the agreement provides for a permanent umpire, or where, as in the instant case, the decision-making tribunal consists of union and management officials with direct experience under the agreement, and often in its negotiation. But it bespeaks no disrespect (and reflects the experience which resulted in the enactment of the Norris-LaGuardia Act) to say that even labor arbitrators who lack familiarity with a particular collective agreement tend to approach such agreements with a different understanding than do courts.

Gardner-Denver Co., 415 U.S. 36, 53:

> As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties.

The Court went on to quote *Steelworkers* v. *Enterprise Mfg. Co.*, *supra*, and to hold, in reliance thereon, that:

> If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of the submission ," and the award will not be enforced. [415 U.S. at 53]

While *Alexander* was decided in the context of Title VII, this reasoning seems to us to merit application to public laws generally.[16]

The parties may, of course, authorize the arbitrator to pass on employees' statutory claims. The employer may hope thereby to channel the entire dispute into the private

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[16] In some instances, the scope of the statutory right depends on the claimant's contractual rights and may therefore justify a different result. For example, this was the dissenting Justices' understanding of the situation in *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351, 367-378. The majority and concurring opinions in *Arguelles* do not address this problem. Nor do we do so here, because it appears to us that the ultimate merits of the dispute in this case concerning the right of the petitioners to be compensated for the work at issue here is governed by the Fair Labor Standards Act rather than by the collective agreement. Cf. *Steiner* v. *Mitchell*, 350 U.S. 247.

machinery and the union may hope to provide the employees with an additional means for vindicating their rights. But these hopes do not provide a basis for *requiring* the employee to use the grievance procedure.

Alexander went on to hold that where an arbitration award has already been rendered, the trial court "should consider the employee's [Title VII] claim *de novo*," but that the "arbitral decision may be admitted as evidence and accorded such weight as the Court deems appropriate" (*id.* at 60). In this respect as well, we think that the Court's underlying reasoning is applicable to statutory rights generally, unless there is some indication of a contrary Congressional intent, or a special relationship between the statutory right at issue and collective bargaining. The Court "adopt[ed] no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case." (*Id.*, n. 21)

Since in this case there has been arbitration, we anticipate that the respondent may urge that this Court adopt standards which would result in deferral to the Joint Grievance Committee's award herein. We therefore comment briefly on this aspect of the problem. We submit that the correct test is that proposed by the American Law Institute's Tentative Draft No. 4 of the Restatement of Judgments:

> § 132. Arbitration Award
>
> (1) Except as stated in subsections (2), (3), and (4), a valid and final award by arbitration has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.

> (2) An award by arbitration with respect to a claim does not preclude relitigation of the same or a related claim based on the same transaction if a scheme of remedies permits assertion of the second claim notwithstanding the award regarding the first claim.
>
> (3) A determination of an issue in arbitration does not preclude relitigation of that issue if:
>
> (a) According preclusive effect to determination of the issue would be incompatible with a legislative policy or contractual provision that the tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question, or with a purpose of the arbitration agreement that the arbitration be specially expeditious; or
>
> (b) The procedure leading to the award lacked the elements of adjudicatory procedure prescribed in § 131(2).
>
> 4. When the terms of reference of an arbitration limit the binding effect of the award in another adjudication or arbitration proceeding, the extent to which the award has conclusive effect is determined in accordance with that limitation.

In this instance, adoption of that standard would under ¶¶ 3 and 4 result in denying effect to the Joint Grievance Committee's award: first, because as we have just shown the *Alexander* doctrine applies here; and second, because it does not affirmatively appear that the Committee considered the petitioners' claims under the FLSA but only their claims under the contract. While, as *Enterprise* holds, arbitrators need not write opinions, a Court which is being asked to give effect either to the factual or the legal determinations of a private tribunal on an individual's *statutory*

rights must be able to assure itself of the adequacy of that tribunal's disposition of both the factual and legal issues. There is nothing in the national labor policy which would, for example, require a United States Court of Appeals in passing on an individual's statutory claim, to require less meticulous findings in or to give greater deference to, the award of an arbitrator than the decision of a United States District Court. If the parties to an agreement wish to have arbitrators pass on statutory in addition to contractual claims, and also wish to have such decisions accorded some degree of finality, or at least respect, by the courts, we think that the surrender of some of the informality of the arbitration proceedings is a cross which they must bear, where Congress has decided "to provide a judicial forum for the ultimate resolution of [statutory] employment claims." See *Alexander,* 415 U.S. at 60, n. 21.

III. The Principles Governing the Arbitration of NLRB Rights

Thus far, we have discussed the rights of individuals under statutes other than the NLRA. Different principles are applicable to the relationship between rights under that statute and arbitration awards because it is the primary purpose of the NLRA to further the collective bargaining process. It is this fundamental difference which distinguishes cases like *Alexander, supra,* and this case from *Carey* v. *Westinghouse,* 375 U.S. 261, which approved the decisions of the NLRB beginning with *Spielberg Mfg. Co.,* 112 NLRB 1080, in which the Board deferred to arbitration awards instead of independently determining whether an employee's rights under the NLRA had been violated (*id.* at 270-271). The NLRB explained the *Spielberg* principle in

International Harvester, Co., 138 NLRB 923, 925-926, which was quoted with approval in *Carey*, 375 U.S. at 270-271:

> "There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held. However, it is equally well established that the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.
>
> "The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration of grievance and disputes arising thereunder, ('as a substitute for industrial strife,') contribute significantly to the attainment of this statutory objective." [17]

This reasoning is sound on the same ground that this Court has sustained the waiver by agreement of certain NLRA rights. The most notable example is *Labor Board* v. *Sands Mfg. Co.*, 306 U.S. 332, which permits the discharge of employees who strike during the term of an agreement in violation of a no-strike commitment. *Sands* gave effect to that contractual undertaking notwithstanding §§ 7 & 8(a)(1) which respectively protect the right to strike and prohibit employer interference with that right, including,

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[17] See also 375 U.S. at 270, n. 7 quoting with approval from *Raley's Inc.* 143 NLRB 256, 258-259 where the Board deferred to an arbitrator's determination of a question of representation.

of course, discharge. As the Court explained in *Mastro Plastics v. Labor Board,* 350 U.S. 270, 280 (emphasis in original):

> On the premise of fair representation, collective-bargaining contracts frequently have included certain waivers of the employees' rights to strike and of the employers' right to lockout to enforce their respective economic demands during the term of those contracts. *Provided the selection of the bargaining representative remains free,* such waivers contribute to the normal flow of commerce and to the maintenance of regular production schedules. Individuals violating such clauses appropriately lose their status as employees.

Mastro Plastics provides two further insights on the relationship between the legality of contractual waivers of NLRA rights and the overall objectives of the Act. First, the Court rejected the employer's contention "that the employees' right to strike against unfair labor practices has been waived by language such as that [in issue]"—*viz.,* by a general no-strike clause sufficient to waive the right to engage in economic strikes (*id.* at 283). Second, the *Mastro* Court expressly left open the question whether the right to engage in unfair labor practice strikes may even be lawfully waived by contract (*id.* at 283).[18]

This case does not require us to draw the line between waivable and non-waivable NLRA rights. For our present point is simply to demonstrate the converse of the proposition developed in Point II above—*viz.,* that where a "statute creates substantive employment rights that are not waivable an arbitration award adverse to the claimant is

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[18] *NLRB* v. *Magnavox,* 415 U.S. 322 invalidates the waiver of § 7 rights concerning employee in-plant distribution of literature.

not entitled to binding effect (even if contrary to the situation here the arbitration purports to determine a statutory claim). Such statutes create employee rights that are ends in themselves and must be treated as such.

On the other hand, even as the waiver of some NLRA rights is consistent with the basic purpose of that statute, it is appropriate for the Board to give effect to arbitration awards that are part and parcel of the collective bargaining process the NLRA and LMRA were enacted to foster. The employee rights stated in those Acts are for the most part not ends in themselves but means to an end—a system of industrial self-government established and carried out by the parties.[19]

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[19] We note that over the years there has been continuing controversy within the Board itself and in the Courts of Appeals as to whether the Board has struck the proper balance in determining whether to defer to particular arbitration awards, or has gone too far or not far enough. That dispute is, of course, quite remote from this case and we therefore do not address it.

We do feel obliged however to comment on the so-called *Collyer* doctrine in light of this Court's remarks on that doctrine, which were not necessary to the decision, in *William E. Arnold Co.* v. *Carpenters,* 417 U.S. 12, 18-19. In the *Collyer* case the Board held that the parties must exhaust contractual grievance procedures before the Board will entertain a *statutory* complaint *which could have been* resolved under the private system. See 192 NLRB 837. Compare *General American Transportation Corp.,* 228 NLRB 808, and *Roy Robinson Chevrolet,* 228 NLRB 828, which limit and restate the scope of *Collyer.*

In our view *Collyer* is not a logical extension of the *Spielberg* doctrine and is indeed harmful to both the arbitration and collective bargaining systems. *Collyer* harms the arbitration system because it requires the parties to decide by arbitration disputes which they have not chosen to submit thereto and in the long run puts them to the choice of abandoning or limiting their grievance pro-

CONCLUSION

For the above stated reasons the judgment below should be reversed.

Respectfully submitted,

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cedures or forfeiting access to the NLRB. *Collyer* harms the collective bargaining system by reading into arbitration clauses a promise never made—to refrain from filing statutory, as opposed to purely contractual, claims with the Board. That is inconsistent with the limits placed on the Board by § 8(d). See *NLRB* v. *Burns Security Services,* 406 U.S. 272, 287 and pp. 15-16, n.9 *supra.* This is especially plain in light of the general rule that where a claim may be based on more than one legal source, the choice is with the *claimant.* See *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (Holmes, J.).

Of course we do not ask the Court to disapprove *Collyer.* But we do urge that while both *Alexander* in its proper sphere and *Carey* (and its approval of *Spielberg*) in its area of application are sound and should be reapproved, no additional sustenance should be given *Collyer.*

No. 79-2006

NOV

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v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an employee's submission of a contractual wage claim to a grievance committee precludes the employee from bringing an action under the Fair Labor Standards Act based on the same events.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	5
Argument	7
An employee does not waive his right to bring suit under the Fair Labor Standards Act for unpaid wages merely by submitting a contractual claim based on the same facts to a grievance committee under a collective bargaining agreement	7
A. The FLSA's enforcement scheme makes clear that the courts are the appropriate forum for determining the rights conferred by the statute	8
B. The FLSA and collective bargaining agreements provide legally distinct rights that are properly enforceable in different forums	16
C. Permitting judicial trials *de novo* on FLSA claims would not diminish the federal policy favoring arbitration of labor disputes	25
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36	*passim*
Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680	14
Bernhardt v. *Polygraphic Co.*, 350 U.S. 198	22
Brooklyn Savings Bank v. *O'Neil*, 324 U.S. 697	17, 26
Dunlop v. *City Electric, Inc.*, 527 F.2d 394	19
Employees v. *Department of Public Health & Welfare of Missouri*, 411 U.S. 279	10

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Cases—Continued — Page

Griggs v. *Duke Power Co.*, 401 U.S. 424 14
Hodgson v. *Miller Brewing Co.*, 457 F.2d 221 12
Hodgson v. *Rickey Fashions, Inc.*, 434 F.2d 1261.. 12
Jewell Ridge Coal Corp. v. *Local No. 6167*, 325 U.S. 161 ..... 17, 19
Mitchell v. *DeMario Jewelry, Inc.*, 361 U.S. 288..11, 12, 26
Mitchell v. *Mitchell Truck Line, Inc.*, 286 F.2d 721 19
Mitchell v. *Stewart Brothers Construction Co.*, 184 F. Supp. 886 19
Mohasco Corp. v. *Silver*, No. 79-616 (June 23, 1980) 9
Overnight Motor Transportation Co. v. *Missel*, 316 U.S. 572 .....12, 21, 26
Satterwhite v. *United Parcel Service, Inc.*, 496 F.2d 448, cert. denied, 419 U.S. 1079.....10, 13, 14, 20, 21, 25, 26
Steiner v. *Mitchell*, 350 U.S. 247 .....15, 17, 19
Teamsters v. *United States*, 431 U.S. 324 14
Tennessee Coal, Iron & R.R. v. *Muscoda Local No. 123*, 321 U.S. 590 ..... 17, 19
Textile Workers Union of America v. *Lincoln Mills*, 353 U.S. 448 25
U.S. Bulk Carriers, Inc. v. *Arguelles*, 400 U.S. 351.. 20
United Steelworkers of America v. *American Manufacturing Co.*, 363 U.S. 564 25
United Steelworkers of America v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 .....18, 22, 25
United Steelworkers of America v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 25
Vaca v. *Sipes*, 386 U.S. 171 3
Walling v. *Helmerich & Payne*, 323 U.S. 37 21

Statutes:

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.* 7
42 U.S.C. 2000e-2 20
42 U.S.C. 2000e-2(h) 14
42 U.S.C. 2000e-5 9

Statutes—Continued Page

Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*..... 1

29 U.S.C. 206 ..... 3, 17
29 U.S.C. 207 ..... 17, 21
29 U.S.C. 216(a) 9
29 U.S.C. 216(b) 1, 9, 11, 13, 23, 24
29 U.S.C. 216(c) 1, 9, 10
29 U.S.C. 217 .....9, 10, 11
29 U.S.C. 218 13

Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*.. 11, 13

29 U.S.C. 251(a) 15
29 U.S.C. 251(b) 13, 15
29 U.S.C. 254 15
29 U.S.C. 255(a) 9, 23
29 U.S.C. 258 13
29 U.S.C. 259 13
29 U.S.C. 260 ..... 11, 23

52 Stat. 1069 ..... 10, 24
63 Stat. 919-920 11
75 Stat. 74 11
88 Stat. 73 11

Miscellaneous:

Azoff, *Joint Committees as an Alternative Form of Arbitration Under the NLRA*, 47 Tul. L. Rev. 325 (1973) 24

Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Education and Labor and the House Comm. on Labor, 75th Cong., 1st Sess. (1937).. 20

Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663 (1973) 23

H.R. Rep. No. 71, 80th Cong., 1st Sess. (1947)..... 12, 14

Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 Cornell L. Q. 519 (1960) 22

Note, *Judicial Review of Arbitration Awards on the Merits*, 63 Harv. L. Rev. 681 (1950) 22

S. Rep. No. 48, 80th Cong., 1st Sess. (1947) 24

Miscellaneous—Continued

Page

S. Rep. No. 145, 87th Cong., 1st Sess. (1961) 11
United States Department of Labor, *Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act* (1979) 12

INTEREST OF THE UNITED STATES

The Secretary of Labor is empowered to enforce the provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201 *et seq.*, by means of suits for injunctive relief and damages. 29 U.S.C. 216(c), 217. As an alternative to enforcement by the Secretary, Congress has authorized "affected" employees to bring private actions in any federal or state court of competent jurisdiction. 29 U.S.C. 216(b). Private FLSA plaintiffs may recover back wages, liquidated damages, reasonable attorney's fees and costs. *Ibid.*

Because the Secretary cannot oversee the pay practices of every employer, he depends in substantial measure on the enforcement efforts of private parties. Any restriction on the ability of affected employees fully to pursue their statutory rights thus has a significant negative impact on the enforcement of the Act.

The court of appeals' decision in this case weakens the private enforcement provisions of the Act by barring private FLSA actions by employees who have submitted a collective bargaining agreement claim based on the same facts to a grievance committee. As the present case illustrates, the court's refusal to entertain an FLSA claim in these circumstances may result in the retention of pay practices that are in apparent violation of the Act. The United States therefore has a substantial interest in the question presented by this case.

STATEMENT

Respondent Arkansas-Best Freight System, Inc. (ABF), an interstate motor carrier of freight, does not pay its drivers for the time they spend checking their vehicles for violations of Department of

Transportation safety regulations and driving them to a repair facility in those instances in which violations are found. Rather, it has instituted the following procedure: Upon arriving at the terminal to begin a trip, an ABF driver "punches in" on a time clock and performs certain preliminary office functions, for which he is paid at non-driving time rates. After the driver completes this preliminary work, he "punches out," locates his vehicle, and makes the required pre-trip safety inspection of the vehicle. If he finds no defects, he proceeds on his trip, for which he is paid at the driving time rate. If, however, the driver discovers a defect, he is required to take the vehicle to a repair facility, which is owned by ABF and located on its premises, where the driver "punches in" on a second clock. In that event, the driver is not paid for the time between his "punch-out" and his second "punch-in"; his paid time recommences with the time spent on repairs. Thus, although the driver is paid for the time spent waiting for the vehicle to be repaired, he is not paid for his prior time spent inspecting the vehicle and driving it to the repair facility (Pet. App. 18a).

Petitioner Lloyd Barrentine and another ABF driver, J. N. Scates,[1] filed several grievances (see, *e.g.*, J.A. 19-21; R. 81)[2] under the collective bargaining agreement between ABF and respondent Local 878 of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen (the Union), claiming back wages for the uncompensated inspec-

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[1] Although Scates was initially a plaintiff in this case, he recently was elected an officer of Local 878 and did not join in the petition for a writ of certiorari.

[2] "R." refers to the record in the district court.

tion and driving time. The drivers relied on Article 50 of the Agreement, which required ABF to pay its employees "for all time worked by them in the service of the employer" (Pet. App. 17a). The joint labor-management committee that heard the grievances denied recovery without stating its reasons for doing so (see, *e.g.*, J.A. 22; R. 95).

The two grievants and six other ABF drivers thereupon brought this action in the United States District Court for the Eastern District of Arkansas.[3] The complaint alleged that ABF had violated the Fair Labor Standards Act (29 U.S.C. 206) by refusing to compensate the drivers for the time spent inspecting their vehicles and transporting them to the repair facility when repairs were required (Count I) and that the Union and its president, respondent A. J. Pickering, had breached their duty of fair representation (see *Vaca* v. *Sipes*, 386 U.S. 171 (1967)) by failing to process the drivers' grievances (Count II (J.A. 3-8).

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[3] Named as plaintiffs, along with petitioner Barrentine and Scates, were petitioners Clyde Edwards, Cleo Keeney, Maxie Blanton, Johnny Robinson, Charley Deaton, H.E. Mitchell and L.R. Young. Prior to trial, the complaint was dismissed with prejudice as to plaintiffs Robinson, Young and Edwards on the ground of their failure to answer interrogatories.

Although only petitioner Barrentine and Scates had filed grievances, the district court rejected respondents' claim that the other employees could not proceed in the case since they had not exhausted their contractual remedies. The court explained that it would have been a futile gesture for the remaining employees to have filed grievances and gone to arbitration in light of their knowledge of the actions that the grievance committee had taken in the cases of Barrentine and Scates. Accordingly, the court "treat[ed] the case as though each of the named plaintiffs had actually filed grievances which were considered and denied" (Pet. App. 6a).

The district court addressed only the fair representation claim. It recognized (Pet. App. 4a) that the collective bargaining agreement, read literally, would require compensation for the time in question, since "[t]here is no question that the driver when [checking the vehicle] is on the employer's business; at least, no question in my mind." Nevertheless, it deferred to the grievance committee's decision that "this time was not spent in the service of the employer within the meaning of the contract" (*id.* at 11a). The court surmised that there probably was a "side deal" between the Union and ABF in regard to the subject of the drivers' dispute and held that such an arrangement was not improper because the parties could by mutual consent "fill in the gaps" in the collective bargaining agreement (*id.* at 8a-9a). The court also concluded that, even if the "side deal" were somehow improper, there was "no evidence that the existence of a side agreement had anything to do with the way these grievances were decided by the Committee" (*id.* at 9a).

The court of appeals affirmed (Pet. App. 14a-31a). The court of appeals agreed that the literal terms of the collective bargaining agreement appeared to cover the disputed time (*id.* at 21a), but it approved of the district court's deferral to the decisions of the grievance committee and rejection of the fair representation claim (*id.* at 29a-30a). The court of appeals also addressed petitioners' FLSA claims, holding (*id.* at 23a-26a) that the employees' prior submission of their contract claims to arbitration barred them from asserting their statutory wage claims in federal court. The court distinguished *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), on the ground that the matter taken to arbitration in that case involved race discrimination and "the right of an employee to be free from such discrimination may

well be thought to stand in more need of protection than conventional arbitration of a simple wage dispute may provide" (Pet. App. 25a).

Judge Heaney dissented. In his view, "the Supreme Court's conclusions in *Alexander* v. *Gardner-Denver Co.* * * * regarding Title VII claims apply with equal force to claims arising under FLSA * * *" (Pet. App. 30a).

SUMMARY OF ARGUMENT

In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), the Court held that an employee's submission to arbitration of a contractual claim based on the non-discrimination provisions of a collective bargaining agreement does not bar him from thereafter bringing a Title VII action in federal court based on the same facts. For similar reasons, an employee's submission of a contractual wage claim to grievance-arbitration should not preclude a subsequent suit under the Fair Labor Standards Act.

A. The plain language of the FLSA provides aggrieved employees with immediate, unrestricted access to the courts. Moreover, the FLSA, like Title VII, relies on the employee's private right of action as an essential means of obtaining judicial enforcement of the statutory scheme. The FLSA, like Title VII, contains no suggestion that this private right of action may be precluded by an employee's prior submission to arbitration of a contractual claim based on the same events. On the contrary, the fact that each statute itself affords alternative forums indicates that the statutes are intended to *augment* whatever other remedies may be available to the employee.

Petitioners satisfied all the statutory requisites for bringing a civil action under the FLSA. There is no statutory basis for the dismissal of their action by the court of appeals.

B. In *Gardner-Denver*, this Court held that Title VII rights are independent of whatever rights may be provided by a collective bargaining agreement. Moreover, because arbitrators are bound by the terms of the collective bargaining agreement in the event of a conflict between the contract and the statute, the Court held that Title VII plaintiffs must be permitted to sue in court notwithstanding a prior submission to arbitration of a contractual claim based on the same facts.

FLSA rights also are independent of and distinct from any rights that may be contained in a collective bargaining agreement. Like Title VII rights, these statutory rights may not be waived prospectively, except as part of a voluntary settlement of a bona fide dispute. If submission of a contractual wage claim to arbitration were held to preclude a subsequent FLSA action in court, the merits of the FLSA claim might never be considered, violations of the Act might not be corrected, and collective bargaining agreements would be permitted to shield employers from liability under the Act. This result would frustrate congressional intent in passing the FLSA and would contravene prior decisions of this Court.

Furthermore, arbitration is an inadequate forum for the vindication of the important economic rights guaranteed by the FLSA. The role of the arbitrator is merely to interpret and apply the terms of the collective bargaining agreement; in doing so he rarely relies on public law concepts, and he has no authority to decide purely statutory matters. In addition, the arbitrator, who is typically not trained in the law, has no special competence or experience in the adjudication of statutory questions. The employee's wage claim may not be adequately presented by his union. And the grievance-arbitration process does not ensure careful, accurate fact-finding of a

kind necessary for the proper determination of statutory claims.

C. Permitting an employee to bring an FLSA action in court after submitting a contractual wage claim to arbitration will not detract from the important federal policy in favor of resolving labor disputes through arbitration. Indeed, a contrary rule would more likely have that result. If submission of a contractual claim to arbitration were to foreclose a subsequent FLSA action, an employee well might eschew the grievance procedure entirely in favor of bringing suit on his statutory claim. We submit, therefore, that the federal policy favoring arbitration and federal wages and hours policy are best accommodated by permitting employees to pursue fully both their remedies under the grievance-arbitration provisions of the collective bargaining agreement and their remedies under the FLSA.

ARGUMENT

AN EMPLOYEE DOES NOT WAIVE HIS RIGHT TO BRING SUIT UNDER THE FAIR LABOR STANDARDS ACT FOR UNPAID WAGES MERELY BY SUBMITTING A CONTRACTUAL CLAIM BASED ON THE SAME FACTS TO A GRIEVANCE COMMITTEE UNDER A COLLECTIVE BARGAINING AGREEMENT

In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court held that an employee's right to a trial de novo in federal court under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, was not precluded by the prior submission of his claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement. In so holding, the Court relied on the statute's enforcement scheme (including its dependence on the private right of action), the independent and distinct nature of

statutory and contractual causes of action, and the fact that permitting a judicial trial de novo on the statutory claim would not detract from the federal policy of settling labor disputes by arbitration. Because each of these factors is also applicable to an employee's claim under the Fair Labor Standards Act, the employee should be equally free to pursue his statutory wage claim in the courts, regardless of his prior submission to arbitration of a contractual dispute based on the same events.

A. The FLSA's Enforcement Scheme Makes Clear That The Courts Are The Appropriate Forum For Determining The Rights Conferred By The Statute

An employee has an unfettered right, under both Title VII and the FLSA, to bring a claim in federal court. Although neither statute speaks directly to the relationship between the courts and the grievance-arbitration mechanisms of collective bargaining agreements, neither does either statute contain any suggestion that "a prior arbitral decision either forecloses an individual's right to sue or divests * * * courts of jurisdiction." *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 47. Indeed, both statutory schemes "strongly suggest" a contrary congressional intent. *Id.* at 49.

1. The fact that the FLSA vests in the courts initial, as well as ultimate, authority for enforcement of the Act clearly demonstrates Congress' intent to allow FLSA plaintiffs unrestricted access to the courts. In holding in *Alexander* v. *Gardner-Denver Co.*, *supra*, that a Title VII suit challenging racial discrimination was not barred by a prior arbitral determination of a grievance arising out of the same facts, this Court was influenced (415 U.S. at 44-45) by the fact that *final* responsibility for securing compliance with Title VII is vested in the courts. It

relied on that consideration notwithstanding its express recognition (*id.* at 44) of the roles played by the Equal Employment Opportunity Commission and state and local equal employment opportunity agencies in achieving the statutory goal of eliminating employment discrimination. That is, Title VII plaintiffs must file a timely charge with a state or local equal employment opportunity agency, where one exists, and with the EEOC, and must then proceed in court within a short period of time after receiving a statutory notice of the right to sue. 42 U.S.C. 2000e-5; see *Mohasco Corp.* v. *Silver*, No. 79-616 (June 23, 1980). The FLSA, on the other hand, permits employees who have not been paid minimum wages or overtime compensation, or the Secretary on their behalf, to recover such liability in any "court of competent jurisdiction" (29 U.S.C. 216(b), (c)), without any requirement of exhaustion.[4] The only statutory restriction on such suits is that they be brought within two years after the accrual of the cause of action (or within three years if the employer's violation is willful). 29 U.S.C. 255(a). Hence, the FLSA permits *immediate* access to the courts and imposes no procedural or other obstacles, thus indicating that an aggrieved employee has a right to judicial determination of his statutory claim.

Moreover, like Title VII (see *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 45), the FLSA relies heavily on the employee's private right of action to play a significant role in obtaining judicial en-

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[4] Under the Act, the courts alone are authorized to issue injunctive relief (29 U.S.C. 217), impose criminal penalties (29 U.S.C. 216(a)), and award actual damages, liquidated damages, reasonable attorney's fees and costs (29 U.S.C. 216(b), (c)).

forcement of the statutory scheme and thus vindicating the public interest.[5] Since the Act's inception in 1938, individual employees have been entitled to sue for back wages plus an equal amount as liquidated damages and to receive reasonable attorney's fees and costs. 52 Stat. 1069. Although the Secretary of Labor from the outset has had authority to seek injunctive relief under the Act (52 Stat. 1069), he had no authority to seek unpaid minimum wages or

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[5] In *Satterwhite* v. *United Parcel Service, Inc.*, 496 F.2d 448, 452, cert. denied, 419 U.S. 1079 (1974), a case on which the court below substantially relied, the Tenth Circuit held that "when a wage dispute is submitted to arbitration in accordance with a collective-bargaining agreement, the employees may not thereafter maintain an FLSA § 16(b) suit for recovery on the basis of the same factual occurrence as that presented to the arbitrator." In the course of its opinion, the Tenth Circuit questioned (496 F.2d at 450) the significance of the private right of action afforded by the FLSA on the basis of this Court's comment in *Employees* v. *Department of Public Health & Welfare of Missouri*, 411 U.S. 279, 286 (1973), that "private enforcement of the [FLSA] was not a paramount objective * * *." That quotation, however, must be read in context. The question presented in *Employees* was whether Congress, in 1966, by merely extending the FLSA's coverage to include employees in a state-run hospital, school or similar institution, intended implicitly to remove the states' Eleventh Amendment immunity from suits in the federal courts by private citizens. The Court explained (411 U.S. at 285-286) that its negative answer to that question did not render meaningless the extension of coverage to state employees, since 29 U.S.C. 216(c) and 217 empowered the Secretary of Labor to seek to obtain restitution on behalf of individual employees and to enjoin violations of the Act. Because it was in the course of that explanation that the Court made the statement referred to in *Satterwhite*, we submit that the Court was not denigrating the importance of private FLSA actions generally, but was merely recognizing that the Act also provides meaningful alternative enforcement methods.

unpaid overtime compensation until 1949, and even then he was permitted to do so only upon an employee's request (63 Stat. 919, 920). The Secretary was not given independent authority to seek full back wages under the FLSA's injunction provision (29 U.S.C. 217) until 1961 (see 75 Stat. 74-75; S. Rep. No. 145, 87th Cong., 1st Sess. 39-41 (1961)),[6] and he was not authorized to seek liquidated damages until 1974 (88 Stat. 73). Even as the scope of the public right of action expanded, however, the employee's private right of action under 29 U.S.C. 216(b) remained an essential means of obtaining judicial enforcement of the FLSA. Cf. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 45.[7]

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[6] In 1960, this Court held that the proviso to 29 U.S.C. 217 "'[t]hat no court shall have jurisdiction, in any action brought by the [Administrator] to restrain [violations of 29 U.S.C. 215], to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action'" did not prevent the Secretary from recovering *lost* wages incident to a wrongful discharge. *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 301 (1960).

[7] Although the *substance* of the FLSA private right of action has never been altered, when the Secretary's powers were expanded in 1961 and 1974 to permit him to sue for full back wages and liquidated damages, the time period for the filing of a private Section 216(b) action was amended in order to preclude an employee from bringing an action once the Secretary already had filed suit. 75 Stat. 74; 88 Stat. 73. The Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, also cut back somewhat on the liquidated damages remedy by providing that such damages would be awarded unless the employer "shows to the satisfaction of the court" that his violation was in "good faith" and that he had "reasonable grounds" for believing he had not violated the Act, in which case the "court may, in its sound discretion," award a lesser amount of liquidated damages or none at all. 29 U.S.C. 260. Prior to the Portal-to-Portal Act, courts had

Congress' preservation of and reliance upon the private right of action under the FLSA is explained by the sheer immensity of the enforcement problem. In 1960, this Court stated that the Act "affect[s] weekly wage dealings between vast numbers of business establishments and employees." *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). A decade later, one court of appeals remarked that "[l]ess than four percent of these [then-covered two million] establishments can be investigated [by the Secretary] each year." *Hodgson* v. *Rickey Fashions, Inc.*, 434 F.2d 1261, 1263 n.2 (5th Cir. 1970). By 1978, the Act covered nearly 52 million employees, more than 84% of the nation's private sector workforce. United States Department of Labor, *Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act* 8 (1979). In that year, the Secretary conducted 61,239 minimum wage and overtime investigations and filed 1,955 suits alleging violations of the Act's minimum wage, overtime, recordkeeping or discriminatory discharge provisions. *Id.* at 29.

The enormous task of ensuring full compliance with the wage laws passed by Congress thus requires the assistance of individual aggrieved employees. Indeed, the fact that the FLSA has always entitled private plaintiffs to attorney's fees indicates both that Congress viewed FLSA plaintiffs as "benefiting not only themselves but also the general public as well" (*Hodgson* v. *Miller Brewing Co.*, 457 F.2d 221, 229 (7th Cir. 1972)) and that resort to the courts by aggrieved private parties is to be encouraged. See *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 45.

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considered themselves bound to award liquidated damages in an amount equal to the actual damages suffered. See *Overnight Transportation Co.* v. *Missel*, 316 U.S. 572 (1942); H.R. Rep. No. 71, 80th Cong., 1st Sess. 8 (1947).

2. As we have shown above, the statutory language of the FLSA makes abundantly clear that the courts possess primary and ultimate authority for enforcing the Act. There is no suggestion in the FLSA, as this Court found there was none in Title VII (*Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 47), that "a prior arbitral decision either forecloses an individual's right to sue or divests * * * courts of jurisdiction." Indeed, the contrary is the case.

The FLSA provides unequivocally for employee actions to be brought in either state or federal court (29 U.S.C. 216(b)). Moreover, the Act expressly preserves other federal and state laws establishing minimum wages or maximum hours (29 U.S.C. 218). Thus, the unmistakable implication is that the FLSA "was designed to supplement rather than supplant" existing avenues of relief. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 48-49.

In holding to the contrary, the court of appeals relied principally on *Satterwhite* v. *United Parcel Service, Inc.*, 496 F.2d 448 (10th Cir.), cert. denied, 419 U.S. 1079 (1974), which found in the FLSA "a greater reliance on contract remedies and a lesser emphasis on individual enforcement" (496 F.2d at 450) than in the Title VII context. The court in *Satterwhite* based this conclusion primarily on the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, which amended the FLSA and other labor laws "to protect the right of collective bargaining and * * * limit the jurisdiction of the courts." 29 U.S.C. 251 (b).[8] But while that policy may describe the goals

[8] The court in *Satterwhite* also alluded briefly (496 F.2d at 450-451) to the provision of the Portal-to-Portal Act establishing the defense of good faith reliance on administrative regulations. 29 U.S.C. 258, 259. In an effort to distinguish

of the Portal-to-Portal Act, it has nothing to do with the issue presented in this case.

The Portal-to-Portal Act of 1947 was enacted in response to this Court's ruling in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946), that time spent by employees walking to work on the employer's premises and performing certain preliminary functions "must be included in the statutory workweek and compensated accordingly, regardless of contrary custom or contract." See H. R. Rep. No. 71, 80th Cong., 1st Sess. 2 (1947). Congress was concerned that the result in *Mt. Clemens Pottery* would impose such large and unexpected liabilities on employers as to constitute a serious "threat to the national economy" as well as to "industrial relations and to the principle of collective bargaining[, since]

Gardner-Denver, the court observed that "in certain circumstances good faith is a defense to an FLSA action. The defense, however, is not available in Title VII actions" (496 F.2d at 451). The relevance of this comparison is far from apparent. Congress' decision to afford employers a good faith defense under the FLSA says nothing about whether it intended arbitrators or the courts to exercise the ultimate authority for determining statutory liability for wage claims. Indeed, because the sole task of the arbitrator is to construe the terms of the collective bargaining agreement, rather than the statute (see pages 17-19, *infra*), the statutory defense is immaterial to the resolution of a contract dispute. In any event, even if the good faith defense under the FLSA were relevant to the question presented, the court in *Satterwhite* ignored the fact that employers under Title VII, but not under the FLSA, have available the defense of "business necessity" (see, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971)) and are exempt from liability under Title VII for employment decisions made pursuant to a bona fide seniority or merit system (42 U.S.C. 2000e-2(h)), a matter that traditionally has been an explicit subject of collective bargaining (*Teamsters* v. *United States*, 431 U.S. 324, 352 (1977)).

[i]n some cases the time now sought to be declared compensable had been the subject of collective-bargaining agreements." *Id.* at 3-4.

Thus, the Portal-to-Portal Act was intended to relieve employers from liability for time spent by an employee "traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" and for "activities which are preliminary to or postliminary to said principal activity or activities," unless such activities were otherwise compensable pursuant to a collective bargaining agreement or a custom or practice in effect at the place of employment. 29 U.S.C. 254. While the Portal-to-Portal Act thus permits collective bargaining agreements to expand (but not to contract) the definition of time compensable under the Act, the FLSA (as amended by the Portal-to-Portal Act) does not "speak expressly to the relationship between [the] courts and the grievance-arbitration machinery of collective-bargaining agreements." *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 47.[9]

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[9] Similarly, the Portal-to-Portal Act's stated policy (29 U.S.C. 251(b)) "to define and limit the jurisdiction of the courts" was "designed to meet an 'existing emergency' resulting from claims which, if allowed in accordance with *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, would have created 'wholly unexpected liabilities, immense in amount and retroactive in operation.'" *Steiner* v. *Mitchell,* 350 U.S. 247, 253 (1956). See 29 U.S.C. 251(a). That policy, however, was effectuated by Congress' withdrawing from the courts jurisdiction over FLSA actions based on activities engaged in prior to May 14, 1947, that were not compensable under either a collective bargaining agreement or a custom or practice in effect at the place of employment (29 U.S.C. 254). See *Steiner* v. *Mitchell, supra,* 350 U.S. at 253. Once again, the amendment sheds no light on the issue presented here—whether grievance arbitrators under a collective

B. The FLSA And Collective Bargaining Agreements Provide Legally Distinct Rights That Are Properly Enforceable In Different Forums

The crux of this Court's decision in *Alexander* v. *Gardner-Denver Co.*, *supra*, is the holding that Title VII affords nonwaivable statutory rights independent of and distinct from whatever rights may be provided by a collective bargaining agreement. As the Court recognized (415 U.S. at 52-54), arbitrators are bound by the terms of the applicable collective bargaining agreement in the event of any conflict between the agreement and federal or state law. Thus, in order to permit the merits of a Title VII claim to be considered in the manner provided by Congress, the Court held that submission to arbitration of a claim under the nondiscrimination clause of a collective bargaining agreement does not foreclose a subsequent Title VII action in the courts. Because this analysis applies with equal force to claims under the FLSA, ABF's election of remedies defense to disputed statutory wage claims should similarly be rejected.

1. First, as the Court emphasized in *Gardner-Denver*, arbitration and litigation are wholly separate means of vindicating distinctly independent rights (415 U.S. at 49-50):

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permit-

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bargaining agreement or the courts are to resolve FLSA claims based on *post*-May 14, 1947 activities.

ting both rights to be enforced in their respectively appropriate forums.

By the same token, an employee's rights under the FLSA to receive the specified minimum wage for all hours worked and a premium rate for all overtime hours (29 U.S.C. 206, 207) are rights accorded by Congress independent of and separate from whatever other rights or benefits may be provided by a collective bargaining agreement. See *Steiner* v. *Mitchell*, 350 U.S. 247, 255-256 (1956); *Jewell Ridge Coal Corp.* v. *Local No. 6167*, 325 U.S. 161, 167 (1945); *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 602-603 (1944).

Moreover, like rights under Title VII (*Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 51-52), the FLSA right to back wages cannot be waived except as part of a voluntary settlement of a bona fide dispute between employer and employee. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707 (1945). Just as a waiver of an employee's statutory right to be free from discriminatory employment practices "would defeat the paramount congressional purpose behind Title VII," *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 51, a waiver by an employee of his statutory wage rights "would nullify the purposes of the [FLSA]." *Brooklyn Savings Bank* v. *O'Neil*, *supra*, 324 U.S. at 707. The mere submission of a contractual wage claim to arbitration under the provisions of a collective bargaining agreement thus cannot be construed to bar an employee from subsequently instituting an FLSA action to pursue his statutory claim based on the same facts. See *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 52.

In addition, as the Court observed in *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 53, it is not the function of an arbitrator to protect rights guar-

anteed by statute. An arbitrator's power is derived completely from the collective bargaining agreement, and his task is limited to construing that agreement so as to effectuate the intent of the parties. This narrow responsibility does not include investigation into or vindication of statutory rights, nor does it include consideration of the public interest. Indeed, "[i]f an arbitral decision is based 'solely upon the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced." *Ibid.*, quoting *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). An arbitrator thus need not be concerned with the legality under the FLSA of a challenged pay practice, but only with its consistency with the provisions of the collective bargaining agreement. So long as the pay practice comports with that agreement, it must be upheld by the arbitrator.

Under the decision of the court of appeals, the ruling of a grievance committee that applied only the terms of the collective bargaining agreement, that did not purport to resolve the FLSA claim and to which the FLSA claim was not even submitted would preclude later judicial review of the merits of an employee's statutory claim.[10] Because an arbitrator

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[10] In its brief in opposition to the petition for a writ of certiorari, ABF asserted (Br. in Opp. 3-4, 5, 16) that petitioners did, in fact, submit their FLSA claims to the grievance committee. Neither court below held that the FLSA claims had been before the grievance committee, and the record fails to substantiate ABF's assertion. The grievances submitted to the committee and the committee reports thereon (J.A. 19-21, 22; R. 81, 95) do not even mention the statu-

is not obliged to enforce federal law, and because (under the court of appeals' holding) a court is powerless to do so after a wage claim has been submitted to arbitration, the result is that, as the present case illustrates, an apparent violation of the FLSA may remain uncorrected.[11] A collective bargaining agreement's condonation of an employer's practice of undercompensating employees thus will have been permitted to shield the employer from liability under the Act, in contravention of congressional intent and this Court's decisions in *Tennessee Coal* (321 U.S. at 602-603) and *Jewell Ridge Coal Corp.* (325 U.S. at 167).

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tory claims. The only mention of federal law in the entire record of the grievance proceeding is the statement in petitioner Barrentine's "member grievance report" (J.A. 21) that "Federal Wage Laws also state that this is compensable time." No statute or judicial decision is cited in the report, however, and this oblique reference cannot reasonably be construed as a submission of the FLSA claim to arbitration. The more likely explanation is that petitioners sought merely to convince the grievance committee to construe the collective bargaining agreement so as not to conflict with applicable wage statutes. In sum, as Judge Heaney stated in dissent (Pet. App. 31a), "there was no intent to submit the FLSA claim to arbitration and it was not submitted to arbitration."

[11] Although the grievance committee found that the collective bargaining agreement did not cover the time spent by employees checking their vehicles for violations of safety regulations and driving them to the repair facility, there can be little doubt that the time is compensable under the FLSA, since those activities are an "integral and indispensable" part of the employees' primary activity of driving ABF's trucks. See, *e.g.*, *Steiner* v. *Mitchell*, 350 U.S. 247, 256 (1956); *Dunlop* v. *City Electric, Inc.*, 527 F.2d 394 (5th Cir. 1976); *Mitchell* v. *Mitchell Truck Line, Inc.*, 286 F.2d 721, 725 (5th Cir. 1961); *Mitchell* v. *Stewart Brothers Construction Co.*, 184 F. Supp. 886, 895 (D. Neb. 1960).

2. This Court made clear in *Alexander* v. *Gardner-Denver Co., supra,* that, even where statutory and contractual causes of action arise out of the same underlying substantive right, they nonetheless are entitled to separate and independent consideration. 415 U.S. at 57-58. This rule is not affected by the observation of the court of appeals in *Satterwhite* (496 F.2d at 451) that wages and hours are the subject of collective bargaining as well as of the FLSA and that many collective bargaining agreements define as contract rights the same rights granted by the federal statute.

Both Title VII and the collective bargaining agreement in *Gardner-Denver* provided that " 'there shall be no discrimination against any employee on account of race, color, religion, sex, [or] national origin * * *' " (see 415 U.S. at 39; 42 U.S.C. 2000e-2). Nevertheless, this Court held that arbitration of the contractual claim neither foreclosed judicial consideration of the statutory claim nor required the courts to defer to the arbitral decision, since " 'the choice of forums inevitably affects the scope of the substantive right to be vindicated.' " *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 56, quoting *U.S. Bulk Carriers* v. *Arguelles,* 400 U.S. 351, 359-360 (1971) (Harlan, J., concurring). This conclusion applies equally in the FLSA context. Indeed, when the proposed FLSA was under consideration, a management spokesman advocated a revision to provide for enforcement of the statute through grievance procedures. *Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Education and Labor and the House Comm. on Labor,* 75th Cong., 1st Sess. 694-695 (1937). Congress never adopted this change, however, choosing instead to place enforcement powers exclusively in the courts.

The Court in *Gardner-Denver* found "arbitral processes comparatively inferior to judicial processes

in the protection of Title VII rights" even "where a collective-bargaining agreement contains provisions facially similar to Title VII," principally because "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land" (415 U.S. at 57). The Court also remarked (*ibid.*) that, in dealing with claims of employment discrimination, "judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts."

The identical concerns arise when claims are brought under the FLSA. Contrary to the court's statement in *Satterwhite* that collective bargaining agreements and the FLSA are both "concerned with rate of pay, an issue which does not require, or lend itself to, public law considerations" (496 F.2d at 451), the goal of the federal statute, unlike a collective bargaining agreement, is not simply the adjustment of the working relationship between particular employees and their employer. For example, Congress' purpose in enacting the maximum hours provision of the FLSA, 29 U.S.C. 207, was "to spread employment by placing financial pressure on the employer through the overtime pay requirement" as well as "to compensate employees for the burden of a workweek in excess of the hours fixed in the Act." *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 40 (1944). Accord, *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572, 576-578 (1942).

In addition, the legal issues arising under the FLSA, like those arising under Title VII, are complex, technical and not answerable merely by reference to "the law of the shop." FLSA claims require statutory interpretation, frequently including resort to legislative history, four decades of judicial deci-

sions construing the Act, and administrative rulings.[12] Arbitrators are without special competence or experience in performing these tasks.

Furthermore, the grievance-arbitration process is not designed to ensure the kind of careful fact-finding appropriate where important rights are at issue. As the Court pointed out in *Gardner-Denver* (415 U.S. at 57-58):

> The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.

The process is basically an informal one in which "[a]rbitrators * * * need not give their reasons for their results [and] the record of their proceedings is not as complete as it is in a court trial * * *." *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203 (1956). See also *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960).

This problem is compounded by the very limited scope of judicial review of arbitration awards. See, *e.g.*, Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 Cornell L.Q. 519, 532-542 (1960); Note, *Judicial Review of Arbitration Awards on the Merits*, 63 Harv. L. Rev. 681 (1950). This limited scope is appropriate, at least in part, because arbitrators merely interpret and apply the disparate provisions of privately-adopted agreements. But Congress has, in the FLSA, created nationwide rights and provided methods for their enforcement intended

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[12] Indeed, with respect to petitioners' claim in the present case, there is a long line of court decisions bearing on whether the time in question is compensable under the Act. See note 11, *supra*.

to assure that they will be judicially defined and uniformly applied.

Moreover, even where the FLSA and a collective bargaining agreement guarantee the same substantive right, the remedies provided for the violation of that right typically will not be co-extensive. Under the FLSA, an employee who has not been paid minimum wages or overtime compensation is entitled to recover such liability plus an equal amount as liquidated damages, unless the employer shows "to the satisfaction of the Court" that his violation was in "good faith" and that he had "reasonable grounds" for believing he had not violated the Act (in which case, the "court may, in its sound discretion," award a lesser amount of liquidated damages or none at all). 29 U.S.C. 216(b), 260. In addition, the court may award attorney's fees and costs. 29 U.S.C. 216(b). It would be the rare collective bargaining agreement that provided equally beneficial remedies to an employee who successfully pursued a wage claim against his employer.

In most cases there also is a substantial discrepancy between the time period for bringing an action under the FLSA and the one for instituting a grievance under a collective bargaining agreement. The FLSA provides that an employee must commence suit thereunder within two years after the accrual of the cause of action (or three years if the employer's violation is willful). 29 U.S.C. 255(a). The typical collective bargaining agreement provides for a significantly shorter limitations period, usually as short as from two days to two months. See Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663, 752 (1973). Hence, if the court of appeals' decision is allowed to stand, an employee who files a grievance relating to wages under the time pressure imposed by his employment contract

may find that he has waived his right to pursue his statutory remedies.

Finally, the concern this Court expressed in *Gardner-Denver* with regard to "the union's exclusive control over the manner and extent to which an individual grievance is presented" (415 U.S. at 58 n.19) is equally troubling in the FLSA context. The Court specifically noted (*ibid.*) that "harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made." In the wage area, too, a union might be willing to sacrifice benefits for one class of employees in an effort to obtain additional compensation elsewhere. The union's collective objective to maximize employee pay hardly signals its interest in any individual case. See Azoff, *Joint Committees as an Alternative Form of Arbitration Under the NLRA*, 47 Tul. L. Rev. 325, 329 (1973). It was for this reason that Congress has steadfastly required that the individual employee, rather than his union, control the processing of the statutory claim. Thus, in 1947, Congress deleted from 29 U.S.C. 216 (b) the provision that had allowed "employees [to] designate an agent or representative to maintain" an action in their behalf. See 52 Stat. 1069; S. Rep. No. 48, 80th Cong., 1st Sess. 49 (1947). And, as noted above (see page 20, *supra*), Congress in 1937 refused to adopt a management proposal that would have provided for enforcement of the FLSA through grievance procedures, which would have been controlled by the union.[13]

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[13] In part because the union, rather than the individual employee, is responsible for processing a grievance under a collective bargaining agreement, even the express submission of the statutory claim to an arbitrator might not foreclose the employee from pursuing his FLSA rights in court.

In sum, the features of the "arbitral procedure that enable[] it to function as an efficient, inexpensive, and expeditious means for dispute resolution" (415 U.S. at 58) render it a less appropriate forum than the courts for the resolution of statutory claims. Unless an FLSA claim may be brought in court subsequent to an arbitral determination of a contractual wage claim, the statute would afford employees little more than that to which they already are entitled under their collective bargaining agreements.

C. Permitting Judicial Trials De Novo On FLSA Claims Would Not Diminish The Federal Policy Favoring Arbitration Of Labor Disputes

Relying solely on the Tenth Circuit's opinion in *Satterwhite*, the court of appeals distinguished this Court's holding in *Gardner-Denver* on the ground (Pet. App. 25a) that "the right of an employee to be free from [racial] discrimination may well be thought to stand in more need of protection than conventional arbitration of a simple wage dispute may provide." The *Satterwhite* court, in turn, had perceived (496 F.2d at 450) a need to compare the policies behind the wage and hour provisions of the FLSA with those underlying the anti-discrimination provisions of Title VII, in order to determine whether the former outweighed the federal policy favoring arbitration of labor disputes.[14] As discussed

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See *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 60 n.21. Because petitioners' FLSA claim plainly was not submitted to the grievance committee in this case (see note 10, *supra*), the Court need not address this question.

[14] See *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Textile Workers Union of America* v. *Lincoln Mills*, 353 U.S. 448 (1957).

above, that court concluded that they did not (496 F.2d at 452). Thus, both the *Satterwhite* court and the court of appeals in this case essentially held that claims of racial discrimination are more important than "simple wage claims" and that, therefore, while the former may take precedence over the federal interest in resolving labor disputes through arbitration, the latter do not.

The court of appeals' analysis is erroneous for a number of reasons. First, the provisions of the FLSA, like those of Title VII, are rooted in strong public policy. The statute was enacted to eliminate those "labor conditions detrimental to a minimum standard of living required for the general well-being of workers" by paying a minimum wage and a premium rate for overtime work, so that employees would receive " '[a] fair day's pay for a fair day's work' " and would be protected from "the evil of 'overwork' as well as 'underpay'." *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, 576, 578 (1942). See also *Mitchell* v. *DeMario Jewelry, Inc.*, *supra*, 361 U.S. at 292; *Brooklyn Savings Bank* v. *O'Neil*, *supra*, 324 U.S. at 706-707. Accordingly, its provisions, like those of Title VII, should be construed to accomplish the Act's compelling purposes.

But more important, as we have shown above (see pages 16-25, *supra*), this Court's decision in *Gardner-Denver* did not depend on the nature or importance of a particular claim, but rather on the independent and distinct nature of statutory and contractual rights. Indeed, contrary to the court of appeals' apparent assumption (Pet. App. 25a), this Court's holding in *Gardner-Denver* presumably encompasses *all* Title VII claims, regardless of whether the alleged discrimination is based on race, color, religion, sex or national origin.

In any event, the importance of the policies underlying the FLSA and Title VII need not be compared, because the federal policy in favor of resolving labor disputes by arbitration is in no way diminished by permitting statutory claims to be brought in court after contractual claims based on the same events have been submitted to arbitration. In *Gardner-Denver*, this Court rejected the contention that "to permit a later resort to the judicial forum would undermine substantially the employer's incentive to arbitrate and would 'sound the death knell for arbitration clauses in labor contracts' " (415 U.S. at 54). Rather, the Court observed that since the *quid pro quo* for an arbitration clause is the union's promise not to strike, and since the grievance-arbitration machinery of the collective bargaining agreement is a relatively inexpensive and expeditious means for resolving disputes and thereby avoiding resort to the more costly and time-consuming judicial forum, arbitration would continue to remain attractive to both employers and employees. *Id.* at 54-55.

Indeed, the result below may *undermine* the policy favoring arbitration of labor disputes. If employees were required to elect between the arbitral and judicial forums, as the court of appeals' decision would force them to do, individuals who believed that their contractual remedies are inadequate or that surer relief might be available under the FLSA would be likely to bypass the grievance procedure. Thus, "the result could well be more litigation, not less" (*Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 59), at the expense of the important public policy favoring private settlement of labor disputes. On the other hand, some employees might choose the speed and expense of the arbitral remedy and (either intentionally or not) would then be required to forego judicial en-

forcement of their statutory rights. Neither contract rights nor statutory rights would be fully vindicated by such a haphazard policy: valid contract claims would in some instances be suppressed in the interest of statutory adjudication, whereas in other cases legitimate FLSA claims would be sacrificed in order to obtain prompt settlement of a contract dispute. Either result would conflict with the Court's statement in *Gardner-Denver* (415 U.S. at 52) that "a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right" to relief.

In sum, we submit that the conclusion reached by this Court in *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 59-60, in the context of Title VII controls this case as well: the federal policy favoring arbitration of labor disputes and the federal wages and hours policy represented by the FLSA can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under the statute.[15]

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[15] An employee, of course, may not obtain a duplicative recovery by pursuing both his arbitral and judicial remedies. See *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 51 n.14.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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